Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

NORMAN LAW, ANDREW GREER, PETER HERRMANN, MICHAEL JARVIS, JR., CHARLES M. RIEB, DOUG SCHREIBER, LAZARO COLLAZO, ROBIN DREIZLER, AND FRANK CRUZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In 1992, the National Collegiate Athletic Association adopted a bylaw that reduced the number of men's basketball coaches each Division I school was allowed to employ without salary limitations to three. To preserve entry-level opportunities in Division I, the NCAA rule also allowed each school to hire an additional "restricted earnings" coach, who could be paid no more than $16,000 per year. Based on a "quick look" analysis and without even defining any relevant market, the Tenth Circuit affirmed a grant of summary judgment in favor of restricted earnings coaches, holding that no trial was necessary to determine that this salary restriction violated Section 1 of the Sherman Act.

The following question is presented:

Whether the NCAA rule limiting the compensation of a fourth basketball coach is so "obviously anticompetitive" as to warrant summary condemnation under the antitrust laws, where market power and anticompetitive effects in a properly defined market were not demonstrated, and where the factfinder was precluded from weighing alleged anticompetitive effects against procompetitive benefits because the evidence did not show that the rule was absolutely necessary to serve a compelling procompetitive need.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

All parties to the proceeding are listed in the caption. The district court certified a class of persons who had served as restricted earnings men's basketball coaches in Division I of the National Collegiate Athletic Association after August 1, 1992, for the purpose of the injunction under review. See App., *infra*, 44a-56a. The parties in two actions encompassing Division I restricted earnings baseball coaches (*Schreiber* v. *NCAA*, No. 94-2053-KHV (D. Kan.)) and restricted earnings coaches in all other NCAA men's and women's Division I sports (*Hall* v. *NCAA*, No. 94-2392-KHV (D. Kan.)) stipulated to be bound on the merits by the principal decision under review. The damages phase of the three cases was tried together, and all three classes were awarded damages based on the decision under review.

The National Collegiate Athletic Association is a voluntary, unincorporated association of colleges, universities, and intercollegiate athletic conferences. The NCAA has no parent corporations or non-wholly-owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

The National Collegiate Athletic Association (NCAA) respectfully petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Tenth Circuit in this case.[1]

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-26a, 27a-36a) are reported at 134 F.3d 1010 and 134 F.3d 1025. The opinion of the district court certifying a class for the purpose of injunctive relief (App., *infra*, 40a-51a) is reported at 167 F.R.D. 178. The order of the district court entering an injunction (App., *infra*, 66a-73a) is unreported. The opinion of the district court granting summary judgment on liability (App., *infra*, 74a-100a) is reported at 902 F. Supp. 1394. The orders of the district court awarding interim attorneys' fees (App., *infra*, 52a-53a and 54a-65a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on January 23, 1998. Timely petitions for rehearing were denied on March 13, 1998. App., *infra*, 101a-102a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination * * *, or conspiracy, in restraint of trade or commerce among the several States * * * is hereby declared to be illegal * * *.

STATEMENT

In a judgment that has since resulted in a staggering treble-damage award of $67 million, whose impact would be borne by the nation's universities, the Tenth Circuit held that the antitrust laws prohibit the NCAA from limiting to three the number of

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[1] Pursuant to S. Ct. Rule 12.4, the NCAA seeks review of the Tenth Circuit's judgments in three separate dockets (10th Cir. Nos. 96-3034, 96-3150, and 96-3186) disposed of in two separate opinions. In all three dockets — one involving an injunction and two involving awards of attorneys' fees — the court's judgment depends on the correctness of its antitrust analysis.

basketball coaches who may be paid unlimited salaries. The court invalidated a rule that attempted to balance the size and quality of coaching staffs while preserving a fourth coaching position for graduate assistant or entry-level coaches by imposing a salary cap on that one position. Although purportedly applying the rule of reason, the court of appeals, reasoning from price-fixing cases, found the rule so "obviously anticompetitive" that it affirmed summary judgment for respondents. The court thus denied the NCAA an opportunity to show at trial that the rule enhanced competitive balance in athletic competition. But "easy labels do not always supply ready answers" (*BMI* v. *CBS*, 441 U.S. 1, 8 (1979)), particularly in "an industry in which horizontal restraints on competition are essential if the product is to be available at all" (*NCAA* v. *Board of Regents of the University of Oklahoma*, 468 U.S. 85, 101 (1984)).

A. Factual Background

1. *The NCAA*

The NCAA, which was founded in 1906 at the request of President Theodore Roosevelt, is an unincorporated, nonprofit association of more than 1100 colleges, universities, and athletic conferences engaged in intercollegiate athletic competition. One of its purposes is "promot[ing] opportunity for equity in competition" among student-athletes and their schools. App., *infra*, 2a. Another "fundamental polic[y] is to maintain intercollegiate athletics as an integral part of the educational program * * * and by so doing, retain a clear line of demarcation between college athletics and professional sports." *NCAA* v. *Tarkanian*, 488 U.S. 179, 183 (1988) (internal quotation marks omitted).

In economic terms, "[w]hat the NCAA and its member institutions" produce and market "is competition itself — contests between competing institutions" that constitute a "particular brand" of sports. *Board of Regents*, 468 U.S. at 101. "The identification of" NCAA sports "with an academic tradition differentiates" them from minor league professional contests and increases their popularity. *Id.* at 101-102.

The NCAA coordinates its members' athletic programs to preserve competitive equity. The NCAA classifies college basketball programs into Divisions I, II, and III. The 300 schools in Division I generally have the strongest and most prestigious

teams. App., *infra*, 2a. The NCAA also legislates uniform playing rules; conducts national championship tournaments in basketball and more than 20 other sports; imposes standards of amateurism and academic eligibility, including strict limits on compensation for student-athletes; limits colleges' conduct in recruiting student-athletes; and sets maximum sizes for coaching staffs and team rosters. *Id.* at 2a; *Board of Regents*, 468 U.S. at 88.

2. *NCAA Coaching Restrictions Before 1992*

By the 1970s, some colleges were expanding their coaching staffs, giving them a substantial advantage over less wealthy rivals. See *Board of Regents of the University of Oklahoma* v. *NCAA*, 561 P.2d 499, 506-507 (Okla. 1977) (*Oklahoma Regents*). The NCAA responded by limiting Division I basketball programs to no more than five coaches. App., *infra*, 80a n.6. It did so "to make everyone begin on equal footing by curtailing potentially monopolistic practices by the more powerful schools and to reorient the athletic programs into their more traditional role as amateur sports operating as a part of the educational process." *Oklahoma Regents,* 561 P.2d at 507. These limits survived two antitrust challenges. See *Hennessey* v. *NCAA*, 564 F.2d 1136 (5th Cir. 1977); *Oklahoma Regents*, *supra.*

The NCAA rules allowing no more than five coaches imposed no limits on the compensation of the head coach and two full-time assistant coaches, but restricted the compensation of the remaining two assistants in one of three ways. Volunteer coaches could receive no compensation; graduate assistants could receive only a grant-in-aid for their tuition; and part-time assistants' compensation could not exceed the value of a grant-in-aid.

Because out-of-state tuition was the limit for compensating part-time coaches, a private school might be able to pay a part-time assistant $20,000, while its public cross-town rival could pay only $8000. NCAA C.A. App. 349. In addition, some colleges evaded the compensation restrictions by arranging for part-time coaches to earn substantial sums — as much as $70,000 at a school with a celebrity head coach — at summer camps affiliated with head coaches. *Id.* at 127, 143, 313-314. By designating a high-paid senior assistant as a "part-time" coach with only a small on-budget salary, schools with leading basketball programs could recruit "part-time" assistants who were qualified to serve

as full-time head or assistant coaches for other schools, and compensate them for full-time work. *Id.* at 127, 143, 313-314.

The schools with four or five *de facto* full-time coaches had a powerful advantage in recruiting athletes. *Id.* at 127. To field competitive teams, other schools were under severe pressure to increase their own spending on coaches and recruiting. App., *infra*, 3a. Colleges that faced greater financial pressures and could not offer lucrative summer employment to their "part-time" coaches complained that the situation was not fair and was harming "competitive equity." NCAA C.A. App. 127.

3. *The 1992 Restricted Earnings Coach Bylaw*

The NCAA in 1989 established a Cost Reduction Committee (CRC) of school administrators and faculty members to recommend ways to contain costs in a manner that would preserve competitive balance among college teams. App., *infra*, 4a; see also NCAA C.A. App. 345, 414. The CRC concluded that attempts at unilateral cost containment would fail because such actions "invariably make[ ] you less competitive" with other institutions. *Id.* at 342. As one CRC member testified, "if I'm allowed to keep ten coaches and you unilaterally restrict the number of coaches on your football team to two, then the school with ten coaches is going to [use] that as a recruiting tool." *Ibid.*

The CRC recommended reducing the number of coaching positions for all Division I sports "by at least one full-time equivalent position." App., *infra*, 6a. The CRC originally intended to reduce basketball coaching positions to three without restricting compensation. NCAA C.A. App. 127, 142-143, 176. The National Association of Basketball Coaches opposed that plan, however, on the ground that it left no position available to apprentice-level coaches. *Id.* at 142, 147, 176.

As a result, the CRC proposed and the NCAA adopted the "REC Rule," which reduced Division I basketball coaching staffs from five to four — a head coach, two assistant coaches, and one entry-level coach called a "restricted earnings coach," or "REC." App., *infra*, 4a. The REC Rule was adopted in January 1991 and took effect on August 1, 1992. *Id.* at 7a.

The CRC intended the REC position to "encourage the development of new coaches while more effectively limiting com-

pensation to such coaches." App., *infra*, 7a. The CRC wanted to ensure that there would be "balance, [a] level playing field with [the fourth] position," rather than the prior abuses involving "part-time" coaches earning top incomes. NCAA C.A. App. 143.

To preserve some opportunity for entry-level coaches, the REC Rule capped the compensation for restricted-earnings coaches at $12,000 per academic year and an additional $4000 during the summer — including summer-camp earnings related in any way to a Division I school or coach. App., *infra*, 5a; see also NCAA C.A. App. 144, 174, 520. The inclusion of summer camp pay in the earnings cap was the principal change from the earlier policy; the $16,000 total approximated the average grant-in-aid for graduate assistants — and, thus, the salaries previously permitted part-time assistant coaches — but it put all institutions on an equal footing. App., *infra*, 6a; see also NCAA C.A. App. 141, 144. Restricted earnings coaches (many of whom really were part-timers) could take other *bona fide* paying jobs at their colleges or elsewhere. See App., *infra*, 6a.

4. *Mobility in the Basketball Coaching Profession*

Men's basketball coaches seek and find part-time or full-time positions at high schools, junior colleges, NCAA institutions in all three divisions, minor professional leagues, and the National Basketball Association. Of all these positions, only one-quarter of the positions at NCAA Division I schools were affected by the REC Rule, and coaches in REC positions could use them as stepping stones to jobs without salary restrictions.

The record in this case illustrates basketball coaches' mobility within the coaching market. Respondent Jarvis rejected two offers of assistant positions (one at Yale) that paid in the "mid-twenties"; instead he chose to serve as the REC on his father's staff. NCAA C.A. App. 242-246. Respondent Herrmann began as a high school head coach; he then became a Division III full-time assistant, a Division I full-time assistant, and a Division I head coach. *Id.* at 223-227. When he lost the last job, he sought employment in all three NCAA divisions, and with professional teams, before accepting a REC position. *Id.* at 216-218, 224. Respondent Law had been a head coach for a high school and a Division III college before becoming a part-time assistant (and then REC) in Division I. *Id.* at 280-285, 295-297. Respondent

Rieb was a graduate assistant in Division II, and a volunteer assistant, part-time assistant, REC, and full-time assistant in Division I. *Id.* at 483-492. Before becoming a graduate assistant (and then REC) at a Division I school, respondent Greer had been an assistant at a junior college, a graduate assistant in Division II, a full-time assistant in Division III, and a part-time assistant at another Division I school. *Id.* at 181-189. Greer left his REC position to become a Division III head coach. *Id.* at 191.

B. Proceedings Below

1. Five men's basketball REC coaches filed a class action alleging that the REC Rule violated Section 1 of the Sherman Act, 15 U.S.C. § 1. The United States District Court for the District of Kansas granted summary judgment to the plaintiffs, concluding that the REC Rule violated the antitrust laws under a "quick look" rule-of-reason analysis. App., *infra*, 87a-100a.

The plaintiffs did not define any relevant market. The district court nevertheless reasoned that, because some unidentified part-time coaches had earned $60,000 to $70,000 before the REC Rule by participating in lucrative summer camps (NCAA C.A. App. 127, 143), and because the REC Rule was intended to curtail such evasions, the rule had an indisputable anticompetitive effect that made market analysis unnecessary. See App., *infra*, 89a-90a. The district court also brushed aside the NCAA's justifications for the REC Rule. App., *infra*, 90a-100a.

After granting summary judgment, the district court permanently enjoined the NCAA from enforcing the REC Rule compensation limits, effectively increasing to four the number of full-time, unrestricted-compensation coaches in Division I basketball programs. App., *infra*, 66a-73a. The court later awarded attorneys' fees (*id.* at 52a-53a, 54a-65a) and certified a class of present and former REC coaches (*id.* at 40a-51a).

2. The NCAA appealed the injunction and fees, and the Tenth Circuit affirmed. App., *infra*, 1a-26a, 27a-36a.[2] Like the district court, the court of appeals purported to apply a "quick look" analysis under the rule of reason. The Tenth Circuit concluded that the REC Rule "fixe[d] the cost of one of the compo-

[2] In this Court, as below, the NCAA challenges the fee awards solely on the ground that plaintiffs should not have prevailed on the antitrust merits.

nent items used by NCAA members to produce the product of Division I basketball"; in the Tenth Circuit's view, the Rule thus "constitute[d] [a] naked horizontal agreement among competitive purchasers to fix price." *Id.* at 11a. Although the court of appeals recognized that in *Board of Regents* the plaintiffs had proven market power in a defined market, the court held that the REC Rule was "so obviously anticompetitive" that there was no need for plaintiffs to identify a relevant market or to prove any marketwide anticompetitive effects. *Id.* at 18a. At no point did the court pause to consider whether *capping* the price of an *input* has the same kind of pernicious effect on consumers as seller price fixing; rather, the court assumed that any adverse effect on the coaches themselves was "obviously anticompetitive."

The court of appeals relied on two factors in holding that the REC Rule had "obvious anticompetitive effects." App., *infra*, 17a. First, the court found that the NCAA "adopted the REC Rule to reduce the high cost of part-time coaches' salaries." *Id.* at 18a. Second, although there was no evidence about the market price for coaching services, the court found that, in "some cases," "the cost-reduction has effectively reduced restricted earnings coaches' salaries." *Ibid.* Based on that fact alone, the court concluded that "the REC Rule was successful in artificially lowering the price of coaching services," and that "no further evidence or analysis is required to find market power to set prices." *Ibid.*

The Tenth Circuit refused to follow *Hennessey* v. *NCAA*, 564 F.2d 1136 (5th Cir. 1977), which held that no anticompetitive effects resulted from the NCAA's original rule limiting the number of full-time coaches. After attempting to distinguish *Hennessey*, the court of appeals acknowledged the conflict but observed that "*Hennessey* is not Tenth Circuit precedent, and accordingly, is not binding authority on us." App., *infra*, 19a.

The Tenth Circuit limited its consideration of procompetitive justifications for the REC Rule to "those necessary to produce competitive intercollegiate sports" (App., *infra*, 20a) and rejected all of the reasons for the Rule. The court found that the NCAA had not "*prove[d]* that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities" (*id.* at 25a (emphasis added)) and that "it is not *clear* that the REC Rule *will equalize* the experience level of such coaches"

(*ibid.* (emphasis added)). The court rejected cost containment as a justification because there was "no evidence that limits on restricted-earnings coaches salaries *would be successful* in reducing deficits, let alone that such reductions were *necessary to save college basketball*." *Id.* at 24a (emphasis added). Because "the nexus between the rule and a *compelling need* to maintain competitive balance" was not "sufficiently *clear on this record*," the court upheld summary judgment and denied the NCAA a trial on the merits. *Id.* at 25a (emphasis added).

3. The district court did not stay the damages phase of the case. The court tried the damages in this case together with two class actions challenging the REC Rule on behalf of coaches in other sports. See p. ii, *supra*. A jury awarded 1900 coaches a total of $22.3 million in damages, trebled to almost $67 million.

REASONS FOR GRANTING THE PETITION

In a case with drastic fiscal consequences for the nation's institutions of higher learning, the court below held that a rule setting an upper limit on the compensation available to the fourth-ranking coach on Division I basketball teams had such "obvious anticompetitive effects" that it could be condemned on summary judgment without any analysis of those effects within a market. That wholly inappropriate application of the "quick look" rule of reason to a sports federation's restriction on one input creates intercircuit conflicts and raises issues of antitrust theory sufficiently important to warrant this Court's attention.

But the importance of this case transcends the legal issues. One of respondents' counsel called this "the most important legal case in the history of intercollegiate athletics." *A Matter of Dollars and Nonsense*, ORANGE COUNTY REGISTER, Feb. 26, 1995, at C10 (quoting Gerald Roth). National media have recognized the case's importance, particularly in light of the massive damages award. See, *e.g.*, *Assistant Coaches Win N.C.A.A. Suit; $66 Million Award*, N.Y. TIMES, May 5, 1998, at A1; see also *A $67 Million Blunder?*, SPORTS ILLUSTRATED, May 18, 1998, at 26 (suggesting that, as a consequence of the decision, "the NCAA might not survive in its current form.").

The Tenth Circuit visited those drastic consequences on the NCAA because it totally misunderstood *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984), the "quick look" rule of reason, and

the proper application of antitrust law to joint *buying* activity in the context of an amateur sports organization. This Court should grant certiorari, endorse the far sounder analysis of such cases as *Hennessey* v. *NCAA*, 564 F.2d 1136 (5th Cir. 1977), and reaffirm that it meant what it said in *Board of Regents* when it observed that the NCAA must be accorded "ample latitude" to "play[ ] [its] critical role in the maintenance of a revered tradition of amateurism in college sports." 468 U.S. at 120.

I. THE TENTH CIRCUIT'S CONDEMNATION OF THE NCAA'S INPUT RESTRICTION CREATES CONFLICTS WITH SEVERAL OTHER CIRCUITS

In *Board of Regents,* this Court rejected as unreasonable an NCAA rule restricting the *sale* to television broadcasters of the final product — intercollegiate athletic contests. This Court distinguished the *production* of those contests, for which "horizontal restraints on competition are essential" (468 U.S. at 101), from restraints on *the terms of sale for the output*. The broadcasting rule was a "*naked* restraint on price and *output*" and required "*some* competitive justification even in the absence of a detailed market analysis." *Id.* at 110 (emphasis added).

This case, by contrast, concerns an *input* — coaching services — to the product of intercollegiate athletic contests. As this Court has recognized, it is the very essence of the NCAA (like any sports league) to bring together teams and define the terms on which they will *jointly* produce the "product" of athletic competition. *Athletic* competition, not *economic* competition, is the primary goal. Joint activity on the production side is therefore not inherently suspect. Rather, this Court in *Board of Regents* had only positive things to say about such cooperation:

> "Some activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, The Antitrust Paradox 278 (1978). What the NCAA and its member institutions market * * * is competition itself — contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be

> marketed. A myriad of rules * * * must be agreed upon, and all restrain the manner in which institutions compete. * * * [T]he integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed.

468 U.S. at 101-102; see *id.* at 88 (citing with approval "rules governing the size of * * * coaching staffs").

This Court in *Board of Regents* parsed with considerable care the NCAA's various activities and condemned *only* one output-restricting activity, while describing input-restricting activities with approval. Largely because of its failure to heed the distinctions this Court drew, the Tenth Circuit misconceived the law, and created conflicts with other circuits, at all major stages of its analysis — its characterization of the REC Rule as "obviously anticompetitive," its condemnation of the rule without determining whether it had actual anticompetitive effects in a properly defined market, and its imposition of an insuperable *post hoc* burden of justification on the NCAA.

A. The Tenth Circuit's Decision Conflicts With Decisions Upholding The Legality Of NCAA Coaching Limitations Under The Rule Of Reason

1. The Tenth Circuit's decision is in square conflict with two decisions that upheld the NCAA's earlier, functionally indistinguishable rule that capped the number of full-time coaches whose salaries were unlimited and restricted part-time coaches to the equivalent of grants-in-aid. Both the Fifth Circuit and the Oklahoma Supreme Court applied a full rule-of-reason analysis in holding that these agreements to limit purchases of coaching services did *not* violate the antitrust laws. See *Hennessey* v. *NCAA, supra; Oklahoma Regents, supra.* Indeed, the Tenth Circuit is the first court ever to invalidate an NCAA restraint on an input into the "product" of college athletic competitions. NCAA rules restricting athlete compensation have been held *valid* with "little difficulty" despite the horizontal restraint on price. *McCormack* v. *NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988). Courts have upheld a variety of other NCAA input restrictions.[3]

[3] See, *e.g.*, *Smith* v. *NCAA*, 139 F.3d 180 (3d Cir. 1998); *Hairston* v. *Pacific 10 Conf.*, 101 F.3d 1315, 1320 (9th Cir. 1996); *Banks* v. *NCAA*, 977

The Tenth Circuit ultimately acknowledged the conflict with *Hennessey* by resting its contrary ruling on the fact that "*Hennessey* is not Tenth Circuit precedent, and accordingly is not binding authority." App., *infra*, 19a. The court's half-hearted efforts elsewhere to distinguish *Hennessey* fell far short. To begin with, the flat input restriction challenged in *Hennessey* is economically identical to the salary cap at issue here. In both cases, the question is whether the NCAA can cut off unrestricted price competition for coaches after a certain number have been hired.

A flat three-coach limit, barring the fourth coach altogether, would have been *more* restrictive of competition for coaches than the REC Rule, which permitted a fourth coach to be paid up to $16,000. In fact, one plaintiff in *Hennessey* complained of his consignment to a part-time position that paid only $2100 at the public college where he coached, after having earned $20,000 as a full-time assistant. 564 F.2d at 1141 n.3. The plaintiffs in *Hennessey* ***proposed*** a salary cap as a less restrictive alternative to limiting the number of coaches. See *id.* at 1154. The lesser economic restraint of a salary cap and the greater restraint of an absolute refusal to hire either must stand together under the rule of reason, as in *Hennessey*, or fall together, as the Tenth Circuit saw it. App., *infra*, 19a; see Yancey, Comment, *Is the Quick Look Too Quick?: Potential Problems with the Quick Look Analysis of Antitrust Litigation*, 44 U. KAN. L. REV. 671, 705-706 (1996); see also *Chicago Prof. Sports Ltd. Partnership* v. *National Basketball Ass'n*, 961 F.2d 667, 676 (7th Cir. 1992) (*Bulls I*).

In a most misguided attempt to justify creating a conflict, the Tenth Circuit speculated that the *Hennessey* court might "have reached a different result" if it had "had the benefit" of this Court's later decision in *Board of Regents*. App., *infra*, 19a. In *Board of Regents*, however, this Court cited *Hennessey* with approval as an example of a case in which the NCAA had ensured the "the integrity of a 'product'" — athletic contests "iden-

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F.2d 1081, 1087-1094 (7th Cir. 1992); *Shelton* v. *NCAA*, 539 F.2d 1197, 1198 (9th Cir. 1976); *Gaines* v. *NCAA*, 746 F. Supp. 738, 744-746 (M.D. Tenn. 1990); *United States* v. *Walters*, 711 F. Supp. 1435, 1441-1442 (N.D. Ill. 1989); *Justice* v. *NCAA*, 577 F. Supp. 356, 379 (D. Ariz. 1983); *Jones* v. *NCAA*, 392 F. Supp. 295, 303 (D. Mass. 1975); *Kupec* v. *Atlantic Coast Conf.*, 399 F. Supp. 1377, 1380 (M.D.N.C. 1975).

tifi[ed] * * * with an academic tradition" — that "cannot be preserved except by mutual agreement," and thus "had play[ed] a vital role in enabling college football to preserve its character"; such actions "widen consumer choice" and "hence can be viewed as procompetitive." 468 U.S. at 101-102 & n.24. The Court's favorable view of *Hennessey* was unanimous: the dissent cited *Hennessey* in specifically approving NCAA limitations on "the number of coaches a school may hire for its football and basketball programs." *Id.* at 123 (White, J., dissenting).

In the end, the Tenth Circuit rested not on distinctions but on the ground that *Hennessey* was "not Tenth Circuit precedent." App., *infra*, 19a. This Court's *Board of Regents* opinion demonstrates that it is the Tenth Circuit that is out of step, not *Hennessey* or *Oklahoma Regents*. The conflict warrants review.[4]

2. The Tenth Circuit's decision rests on its assessment that the REC Rule is a "naked price restraint" that is "obviously anticompetitive" and "nearly identical" to the *output* restraint condemned in *Board of Regents*. App., *infra*, 17a-18a. The court could not have been more wrong.

Input and output restraints are not economically identical and do not receive the same legal treatment. See Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 45. Sellers violate the most settled prohibition in antitrust law when they enter into naked agreements not to sell except at a particular price. By

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[4] *Hennessey* and *Oklahoma Regents* reflect sound economic principles. As one analysis of buyer-side restraints concludes:

> The courts' failure to develop a consistent general theory or methodology * * * has not caused them to reach incorrect results. The courts have seemed to grasp, intuitively, the point that ***purchasing restraints should not be treated harshly***. Faced with specific fact situations, the cases usually reach results consistent with sound economic analysis.

Jacobson & Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 26 (1991) (emphasis added). The same authors decry judicial decisions — such as the one below — that "leave[ ] the inaccurate impression that the antitrust treatment of buyer conduct should be 'symmetric' to the treatment of seller behavior" (*id.* at 3), or are "inconsistent[ ] with" this "Court's recognition in *NCAA v. Board of Regents* that enhancement of the quality of the sport is a legitimate procompetitive justification that must be considered under the rule of reason" (*id.* at 34-35 (footnotes omitted)).

contrast, most joint *purchasing* arrangements "do not raise antitrust concerns" at all. U.S. Dep't of Justice & FTC, *Statements of Antitrust Enforcement Policy in Health Care* (1996) (*DOJ/FTC Health Care Statements*), reprinted in 4 Trade Reg. Rep. ¶ 13,153, at 20,812. Indeed, the joint purchase of *inputs* by a cooperative of horizontal competitors in an *output* market is not an "activity characteristically likely to result in predominantly anticompetitive effects." *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985).[5]

Furthermore, whatever the proper antitrust treatment of *naked* price agreements among buyers may be, it is flatly wrong to apply the price-fixing paradigm to restrictions on competition among buyers that further their joint production of a product. As this Court recognized in *Board of Regents*, 468 U.S. at 101, such restraints are classic examples of restraints ancillary to a legitimate joint venture. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 416 & n.131 (4th ed. 1997); see also *Chicago Prof. Sports Ltd. Partnership* v. *National Basketball Ass'n*, 95 F.3d 593, 598-599 (7th Cir. 1996) (*Bulls II*).

The Tenth Circuit's conclusions that the buyer restraint at issue is "naked" and "obviously anticompetitive" cannot be squared with *Board of Regents*. This Court recognized the general principle permitting buying-side cooperation by joint venturers, and cited as an example of the NCAA's "important role" its adoption of "rules * * * governing the size of * * * coaching staffs." 468 U.S. at 88. The Court specifically identified *Hennessey* and *Oklahoma Regents* as cases that involved NCAA actions that "can be viewed as procompetitive." *Id.* at 102 & n.24.

The input limitation at issue here is not at all a "naked restrain[t] of trade with no purpose except stifling of competition." *BMI*, 441 U.S. at 20. Rather, the REC Rule was one of myriad input-restricting rules appropriately designed for the "product" of athletic contests within the framework of higher education. See pp. 2-3, *supra; Board of Regents*, 468 U.S. at 101-102. To condemn such a rule on the basis of *Board of Regents* — which

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[5] Senator Sherman believed that his bill contained "nothing * * * to prevent a refusal by anybody to buy anything. All that it says is that the people producing or selling a particular article shall not make combinations to advance the price of the necessaries of life." 20 CONG. REC. 1458 (1889).

involved an unjustified restraint on the *output* of the legitimate joint venture — reflects a fundamental misunderstanding of that decision, which this Court should correct.

Moreover, the REC Rule is a "restraint in a *limited* aspect of a market" that "may actually enhance marketwide competition." *Board of Regents*, 468 U.S. at 103 (emphasis added).[6] This Court approved a closely analogous pricing limitation in *Chicago Bd. of Trade* v. *United States*, 246 U.S. 231 (1918) (Brandeis, J.). In *Chicago Board*, the members of a commodities exchange agreed that they would not purchase exchange-traded commodities while the exchange was closed except at the exchange closing price on the last trading day. Viewed through a microscope, that agreement was pure price fixing, but this Court held that the limited restraint served the greater good of the exchange, and so was permissible. *Id.* at 238-239. So too here, the limitation of full-time coaches to three and the REC Rule limitations on the fourth coach leave NCAA members free to bid up the price of coaching services for most of their positions, but reserve a single position for an apprentice coach. The rest of the coaching market — 900 unlimited-compensation coaching positions in Division I and thousands more in Divisions II and III, professional leagues, junior colleges, and high schools — remains unchanged.

3. Although the court of appeals thought it "obviously anticompetitive" for the NCAA to place *any* limit on the salaries paid *any* coaches, it is far from obvious that labor-market restraints in the sports league context are anticompetitive. There is

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[6] The Tenth Circuit was skeptical that the REC Rule could actually enhance competitive balance among basketball teams. App., *infra*, 25a. The court's skepticism was no reason to deny the NCAA a trial to show otherwise, but in any event the court's framework for analysis was wrong. If the REC Rule truly has a trivial impact on the game, that is because it affects so little of one input, coaching. It makes no sense to treat such a limited restraint as "obviously anticompetitive" (and sufficient justification for a $67 million judgment), yet so limited in its impact that its procompetitive effects can be disregarded. Ordinarily, under the rule of reason, the limited nature of a restraint is a ground to uphold it, not to strike it down. Cf. *Virtual Maintenance, Inc.* v. *Prime Computer, Inc.*, 957 F.2d 1318, 1330 (6th Cir.), vacated, 506 U.S. 910 (1992), reinstated in pertinent part, 11 F.3d 660, 663-664 (6th Cir. 1993); *Brokerage Concepts, Inc.* v. *U.S. Healthcare, Inc.*, 140 F.3d 494, 519-520 (3d Cir. 1998).

considerable academic debate on this subject.[7] Some courts and academics go so far as to contend that the antitrust laws do not forbid concerted restraints on competition for any purchase of labor unless competition in an output market also is restrained.[8]

One reason why it is far from clear that collectively imposed labor restraints are anticompetitive is that they tend to lower rather than raise prices. As this Court recently reiterated, "[l]ow prices benefit consumers regardless of how those prices are set." *State Oil Co.* v. *Khan*, 118 S. Ct. 275, 282 (1997). For that reason, Justice Breyer observed as a Circuit Judge, "the relevant economic considerations may be very different when low prices, rather than high prices, are at issue," and "courts * * * should be * * * reluctant to condemn too speedily * * * an arrangement that on its face, appears to bring low price benefits to the consumer." *Kartell* v. *Blue Shield*, 749 F.2d 922, 931 (1st Cir. 1984).

It is not anticompetitive simply to eliminate a narrow degree of rivalry among a limited group of horizontal competitors unless that elimination also harms consumer welfare. *Rothery Storage & Van Co.* v. *Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986) (Bork, J., joined by R.B. Ginsburg, J.). What makes some "input sellers unhappy" may help rather than harm consumers. Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 3-4. And the interests of consumers, not those of input sellers, must govern antitrust analysis because "Congress designed the Sherman Act as a consumer welfare prescription." *Reiter* v. *Sonotone Corp.*,

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[7] Compare Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 33-35; Jacobs & Winter, *Antitrust Principles and Collective Bargaining by Athletes: Of Superstars in Peonage*, 81 YALE L.J. 1, 2-6 (1971); and Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Market Restraints*, 75 GEO. L.J. 19, 34-58 (1986), with Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 527.

[8] Compare the decision below with *Carpenters Local Union No. 1846* v. *Pratt-Farnsworth, Inc.*, 690 F.2d 489, 534 (5th Cir. 1982) (concerted employer "restraint at the level of the labor market itself does not state a claim of violation of the antitrust laws"), and *Carroll* v. *Protection Maritime Ins. Co.*, 512 F.2d 4, 9-10 (1st Cir. 1975) (same). Compare Altman, *Antitrust: A New Tool for Organized Labor?*, 131 U. PA. L. REV. 127 (1982), with Jerry & Knebel, *Antitrust and Employer Restraints in Labor Markets*, 6 INDUS. REL. L.J. 173 (1984).

442 U.S. 330, 343 (1979); see *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 493 (1940) (Act prohibits restraints that operate "to the detriment of purchasers or consumers of goods and services"). Just such considerations — the recognition that under the antitrust laws the "fundamental test of the reasonableness of [a] restraint is its effect on the *public*" — led the Oklahoma Supreme Court to hold that the NCAA's earlier limitations on the number of full-time professional coaches did not violate the antitrust laws. *Oklahoma Regents*, 561 P.2d at 506 (emphasis added).

Because "buyer agreements are rarely likely to have significant anticompetitive effects" on consumers, "the antitrust treatment of joint buyer activity should not be symmetrical to the treatment of joint seller activity." Jacobson & Dorman, *supra,* 36 ANTITRUST BULL. at 4. In general, the antitrust laws have little concern with buyers' ability to pay *lower* prices unless an intermediate buyer may reduce *output* by paying its suppliers less than a competitive price, and then take advantage of the shortage to turn around and charge supracompetitive prices to consumers. 2A P. AREEDA ET AL., ANTITRUST LAW ¶ 574, at 300 & n.2 (1995). But there are no such dangers here.

This Court in *Board of Regents* understood — yet the Tenth Circuit completely failed to grasp — that an output-reducing effect is the *sine qua non* of an antitrust violation. This Court declared in *Apex Hosiery* that it "never applied the Sherman Act in any case, whether or not involving labor * * * unless * * * there was some form of restraint upon commercial competition in the marketing of goods or services" — *i.e.*, output markets. 310 U.S. at 493. And as Judge Easterbrook, speaking for a panel, put it, "The core question in antitrust is output. Unless a contract reduces output in some market, to the detriment of consumers, there is no antitrust problem." *Bulls II*, 95 F.3d at 597.[9] The

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[9] See also *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 485 U.S. 717, 723 (1988) (to be "manifestly anticompetitive," a practice must "always or almost always tend to restrict competition *and decrease output*") (emphasis added and internal quotation marks omitted); *Association for Intercollegiate Athletics for Women* v. *NCAA*, 735 F.2d 577, 583 n.7 (D.C. Cir. 1984) (Tamm, Wald & R.B. Ginsburg, JJ.) ("If the practice allows an entity to supply more goods for less cost, it has procompetitive effects. If the practice excludes competitors or *restricts output* without decreasing the cost of production, [it] generally will *increase the price of consumption* and

limited antitrust concern that does exist with buyer-side restraints stems from the possibility that some such restraints will reduce output and thereby harm allocative efficiency. See Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 17. This Court was acutely aware of the need for an output-limiting effect in *Board of Regents*. See 468 U.S. at 104, 106-107, 110, 114, 116-117, 120. Yet the court of appeals branded the REC Rule "obviously anticompetitive" without *one word* about its effect on output.

Courts should be especially reluctant to condemn cost-cutting measures in sports contexts, where those who agree with each other to limit buying-side competition compete with each other not in the marketplace, but on a court or playing field. See *Board of Regents*, 468 U.S. at 102; Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 28 & n.49, 34-35, 64, 77-78. "The essence of successful league competition is maintaining a balance of power among the competitors — a goal antithetic to the goals of competition in a conventional economic market." *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588, 595 (7th Cir. 1984) (Posner, J.). Limiting individual teams' ability to engage in unlimited spending to attain sporting advantages is a way to *enhance* — not degrade — the product consumers want, *i.e.*, competitive leagues and tournaments.

By deeming "obviously anticompetitive" the NCAA's attempt to limit the cost of one coaching position, however, the Tenth Circuit collapsed a complex economic analysis into the conclusory label "price-fixing." That "easy label[ ]" led to the wrong answer, *BMI*, 441 U.S. at 8, so that, in Justice Breyer's words, the court of appeals "condemned too speedily" a procompetitive restraint. *Kartell*, 749 F.2d at 934.

B. The Tenth Circuit's Decision Conflicts With Decisions Of Other Circuits Because It Condemned The Restraint Based On A "Quick Look" Without Proof Of Market Power Or Anticompetitive Effects In A Discernible Market

Most business practices challenged under the antitrust laws "are analyzed under a 'rule of reason'" that requires "the finder of fact" to "decide whether the questioned practice imposes an

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thus have anticompetitive effects.") (emphasis added and citation omitted).

unreasonable restraint on competition." *State Oil*, 118 S. Ct. at 279. The plaintiff must prove that the defendant has market power or that the practice has actual anticompetitive effects in a properly defined market. See *Board of Regents*, 468 U.S. at 104-113. If such a showing is made, the factfinder compares any evidence of procompetitive benefits of the practice with its adverse effect on competition. *Id.* at 104.

A few extraordinarily pernicious practices, including naked price fixing among competing sellers, are condemned *per se*. *State Oil*, 118 S. Ct. at 279. And in limited circumstances involving restraints that appear anticompetitive but may not warrant categorical prohibition, the Court has applied a "quick look" analysis that requires the defendant to advance plausible procompetitive benefits without first requiring a detailed inquiry into anticompetitive effects. *Board of Regents*, 468 U.S. at 100-117; *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 457-464 (1986).

The Tenth Circuit applied the "quick look" rule of reason in this case in a way that conflicts with decisions in other circuits.

1. The Tenth Circuit held that any horizontal agreement not to compete on price could be condemned under the rule of reason without assessing the relevant market or the existence of *market-wide* anticompetitive effects. App., *infra*, 16a-19a. By contrast, several courts of appeals have held that a practice may not be condemned under the rule of reason, even in a "quick look" analysis, unless the defendant has market power (or causes actual anticompetitive effects) in a relevant market.

This Court observed in *Board of Regents* that no "*detailed* market analysis" was necessary to show the anticompetitive effect of a seller's "*naked* restraint on price and output" (468 U.S. at 109-110 (emphasis added)), but the Court did not dispense with market analysis altogether in the way the Tenth Circuit did here. To the contrary, before requiring the NCAA to justify its output-limiting television restrictions, this Court determined that the NCAA *did* "possess market power" in a properly defined "separate market for telecasts of college football." *Id.* at 112; see also *Indiana Dentists*, 476 U.S. at 460.

Other courts of appeals interpret *Board of Regents* in this way.[10] In applying the "quick look," the Ninth Circuit requires "some analysis of market power," although that analysis need not amount to "the full economic analysis of market power often required under the full rule of reason" if the restraint is "facially anticompetitive." *California Dental Ass'n* v. *FTC*, 128 F.3d 720, 729, 730 (9th Cir. 1997), petition for cert. pending, No. 97-1625.[11] Similarly, the Sixth Circuit has held that "evidence of the power of [defendants] in the relevant market" is necessary for an agreement to be condemned under a "quick look." *Detroit Auto Dealers Ass'n* v. *FTC*, 955 F.2d 457, 470 (1992) (applying *Indiana Dentists*). And the Eleventh Circuit found "tortured" an argument that *Board of Regents* obviated any "showing of market power and diminution of competition." *DeLong Equip. Co.* v. *Washington Mills Abrasive Co.*, 887 F.2d 1499, 1507 n.10 (1989). In that court's view, this Court in *Board of Regents* held only that "a lengthy economic analysis of market power is unnecessary" if market power is "evident" from the record. *Ibid.*[12]

The decision below also conflicts with the Second Circuit's holding that, in every rule-of-reason case, "quick look" or not, the plaintiff must either "establish that defendants possess the

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[10] Leading commentators also agree. *Board of Regents* "did not denigrate any and all proof of power and industry circumstances. Rather, it dispensed with 'elaborate,' 'detailed,' 'extensive,' and 'lengthy analysis' of the industry, market, or power." 7 AREEDA, *supra*, ¶ 1511, at 433 (1986); see also Kauper, *The Sullivan Approach to Horizontal Restraints*, 75 CAL. L. REV. 893, 914 (1987) (under quick look, "the issue of market power must be addressed directly" before conduct is condemned). Some market power screen is necessary if the rule of reason is to have any meaning because entities "that lack [market] power cannot injure competition no matter how hard they try." Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 20 (1984).

[11] Thus, in *California Dental*, although the FTC had not proved "what the market shares are in particular localities," the Ninth Circuit noted that the FTC had proved that the association accounted for "75 percent of licensed dentists in California," which was "fairly strong evidence." 128 F.3d at 730. Even so, the Ninth Circuit still required evidence of "significant barriers to entry" that might "convert this market share into market power." *Ibid.*

[12] See also *Bulls II*, 95 F.3d at 600 (in *Board of Regents* "the Court satisfied itself that the NCAA possesses market power" before "cast[ing] any burden of justification on the NCAA").

requisite market power so that their arrangement has the potential for genuine adverse effects on competition" or "demonstrate actual detrimental effects, such as a reduction of output," in a relevant market. *Capital Imaging Assocs.* v. *Mohawk Valley Med. Assocs.*, 996 F.2d 537, 545 (2d Cir. 1993). The Seventh Circuit likewise requires a plaintiff to show "anti-competitive effects on a discernible market" in any rule-of-reason case. *Banks* v. *NCAA*, 977 F.2d 1081, 1088 (7th Cir. 1992). The Court should grant review to resolve this conflict as well.

2. The Tenth Circuit purported to find that the REC Rule had actual anticompetitive effects (App., *infra*, 19a), but that bald conclusion is meaningless because the court of appeals did not delineate a proper market within which such effects could be gauged. In *Board of Regents*, the dispositive effect was a reduction in *output*. *Board of Regents*, 468 U.S. at 120. In this case, by contrast, there was no suggestion that any output had been reduced; moreover, had there been evidence of a reduction in an *input*, that could not have advanced plaintiffs' case because improved *efficiencies* always result in reduced input.

The Tenth Circuit believed, however, that it could find an anticompetitive effect by inferring that NCAA members would not have prescribed the REC Rule unless the coaches' salaries would have been higher in a competitive marketplace. App., *infra*, 22a. But that conclusion does not follow: the NCAA intended that the lower salary would operate, not to reduce the compensation of existing coaches, but to substitute entry-level coaches for more experienced coaches who would seek higher-paying opportunities elsewhere. The evidence at the damages trial showed that exactly that phenomenon occurred. More than 75% of the coaches in REC positions were new. Out of the class of 3000 REC coaches, fewer than 100 previously received more than the cap amount and took pay cuts when the REC Rule took effect.

Respondents did not advance any definition of the relevant market, much less introduce evidence that the REC Rule had actual detrimental effects in a relevant market. The only evidence the Tenth Circuit cited to show the supposed effects of the REC Rule was deposition testimony that "some" unspecified part-time coaches formerly had earned $60,000 to $70,000 annually because they were employed at basketball summer camps operated

by their head coaches. NCAA C.A. App. 127, 143. But evidence of episodic effects on "some" unnamed individuals does not show a marketwide anticompetitive effect. *Lie* v. *St. Joseph Hosp.*, 964 F.2d 567, 570 (6th Cir. 1992). "Rather, a practice is 'anticompetitive' only if it harms the competitive process." *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 21 (1st Cir. 1990) (Breyer, J.). Yet the Tenth Circuit entirely disregarded the competitive *process* for the sale of coaching services.[13]

In the end, the Tenth Circuit reasoned by tautology: because NCAA members did not pay REC coaches more than $16,000, the "price of coaching services" was restrained. See App., *infra*, 18a. Lacking any evidence that the "price of coaching services" in general was affected, the Tenth Circuit simply labeled the restraint an "effect" in itself.

3. Because respondents presented no evidence of anticompetitive effects, the question of market power should have been dispositive. The relevant market here consists of competing *buyers* for the coaches' services, and is measured by all positions that would provide reasonable substitutes for REC positions. See *United States* v. *E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 392-399 (1956). As the record in this case demonstrates (see pp. 5-6, *supra*), the market for coaching services embraces at a minimum *all* positions at *all* levels of the NCAA, as well as paid positions in junior colleges, high schools, Amateur Athletic Union leagues, and professional leagues such as the National Basketball Association, the Continental Basketball Association, and the United States Basketball League. The question of market definition in this case is not at all like that in *Board of Regents*, where only the NCAA and its members could sell major college football telecast rights; rather, the NCAA and its member institutions have many competitors for the purchase of coaching talent. The Fifth Circuit in *Hennessey* recognized the breadth of this market. 564 F.2d at 1154.

The *only* evidence on this issue showed that the positions covered by the REC rule accounted for no more than 8% of the

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[13] By contrast, the Third Circuit has expressly distinguished between the marketwide anticompetitive effect of an agreement and the self-evident effect of an agreed-upon price on particular transactions made at that price. *United States* v. *Brown Univ.*, 5 F.3d 658, 674 (3d Cir. 1993).

basketball coaching market. App., *infra*, 16a. As a matter of law, such a limited restraint could not have anticompetitive effects. See, *e.g.*, *Oksanen* v. *Page Memorial Hosp.*, 945 F.2d 696, 709 (4th Cir. 1991) (defendant with only 5.2% market share unlikely to "significantly restrain trade"); *Rothery Storage*, 792 F.2d at 220 n.7 (defendant with 6% market share could not injure competition); *DOJ/FTC Health Care Statements*, 4 Trade Reg. Rep. at 20,812 (joint purchasing agreements involving less than 35% of a market raise no antitrust concerns).

A proper market analysis should have resulted in summary judgment *for* the NCAA. See Yancey, *supra*, 44 U. KAN. L. REV. at 703-706. At the least, given the restraint and market at issue here, the evidence created a triable issue of fact, precluding summary judgment, on the question whether the REC Rule had anticompetitive effects in any relevant market at all.[14]

C. The Tenth Circuit, In Conflict With Other Circuits, Unduly Narrowed The Justifications Available To Invoke A Full Rule-of-Reason Analysis

1. Under a "quick look" analysis, a court is supposed to determine whether the defendant has advanced a plausible competitive justification sufficient to warrant a full rule-of-reason inquiry into the actual effects of the practice. Only if anticompetitive effects exist need the court determine whether the procompetitive benefits outweigh the adverse effects. The Tenth Circuit assessed the justifications for the REC Rule with its thumb firmly on the scale, holding that the restraint must be condemned summarily unless the defendant could prove to the court's satisfaction that the challenged restraint invariably achieved the asserted procompetitive benefit, and that the restraint was "necessary" to achieve

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[14] That conclusion is bolstered by the difficulty that *buyers* have in exerting market power. Buyers of an input can exert monopsony power only when the input is uniquely valuable in its current use, so that, even if the price is depressed by a group of buyers acting collectively, *sellers* of the input cannot find alternative *buyers*. See R. POSNER & F. EASTERBROOK, ANTITRUST LAW 150 (2d ed. 1982). Thus, in *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 240-242 (1948), the refiners' monopsonistic price-fixing scheme succeeded because sugar-beet growers could not easily find other buyers or profitably switch to other crops. See Jacobson & Dorman, *supra*, 36 ANTITRUST BULL. at 29-30. By contrast, basketball coaches can sell their services to a wide variety of buyers.

a procompetitive end for which there was a "*compelling* need." App., *infra*, 20a, 25a (emphasis added).

That restrictive approach conflicts with the holding of the Seventh Circuit that, in a "quick look" analysis, a defendant need only articulate "some explanation connecting the [challenged] practice to consumers' benefits" to shift the inquiry to the "analysis of market power" that stands at the threshold of the full rule-of-reason analysis. *Bulls I*, 961 F.2d at 674. In addition, the Third Circuit has held that the burden of a defendant undergoing a "quick look" is merely to "justify" the restraint "with some pro-competitive virtue." *United States* v. *Brown Univ.*, 5 F.3d 658, 674 (1993). That court refused to require defendants to produce a "persuasive procompetitive justification, or a showing of necessity," simply to trigger full rule-of-reason review (*id.* at 676); rather, "the *asserted* procompetitive and pro-consumer features" of the challenged agreement sufficed to require "a full rule of reason analysis." *Id.* at 678 (emphasis added).

Professor Areeda agreed with this conception of "quick look" review: a defendant may "avoid summary condemnation if [it] claims justification of the kind which a 'quick look' — *usually at the arguments alone* — shows to be legitimate in principle and capable of being proved satisfactorily." 7 AREEDA, *supra*, ¶ 1511, at 428-429 (emphasis added). That modest showing shifts to the plaintiff the burden to demonstrate market power or anticompetitive effects in a market. *Id.* at 429. Only after such a showing does a defendant "have the burden of coming forward with allegations and evidence that the justifications claimed are legitimate in principle and are actually promoted significantly by the restraint." *Ibid.*; see also Schmalensee, *Agreements Between Competitors*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 98, 110-111 (Jorde et al., eds., 1992).

This conflict among the circuits on the proper structure of the "quick look" rule-of-reason analysis warrants further review.

2. In *Board of Regents*, this Court found it "reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics." 468 U.S. at 117. The Court identified the promulgation of "rules governing the size of * * *

coaching staffs" as part of the NCAA's "important role in the regulation of amateur collegiate sports." *Id.* at 88. And the Court cited *Hennessey* in illustrating "procompetitive" NCAA actions that help college sports "preserve [their] character." *Id.* at 102 & n.24. That precedent should have been sufficient for the Tenth Circuit at least to allow a factfinder to balance the supposed anti-competitive effects of the REC Rule against the procompetitive benefits shown by the evidence: maintaining competitive balance, controlling athletic department costs, and providing an opportunity for entry-level coaches to work in Division I programs.

Instead, the court of appeals measured the REC Rule's benefits against an impossible standard. The Rule had to serve a "compelling need" (App., *infra*, 25a) — a function that was absolutely "necessary to produce competitive intercollegiate sports" (*id.* at 20a) — and the Rule had to be invariably "successful" in achieving the stated benefit. *Id.* at 24a. That approach wholly misconceives proper rule-of-reason analysis, which assesses whether a "restraint, *viewed at the time it was adopted*, may promote the success of * * * more extensive cooperation" toward a joint undertaking like intercollegiate sports. *Polk Bros., Inc.* v. *Forest City Enters., Inc.*, 776 F.2d 185, 189 (7th Cir. 1985) (Easterbrook, J.) (emphasis added).[15]

The Tenth Circuit declared that the REC Rule "was nothing but a cost-cutting measure." App., *infra*, 25a. In so stating, the court disregarded extensive testimony about the Rule's relation to the competitive balance between colleges that stockpiled experienced coaches as their fourth and fifth coach and schools that had graduate students or *bona fide* part-time coaches in those positions. See pp. 3-4, *supra*.

Just as the NCAA lawfully may restrict roster sizes, player compensation (in such forms as scholarships), practice hours,

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[15] The Tenth Circuit disregarded the traditional meaning of "necessary" in rule-of-reason analysis — *i.e.*, "*reasonably* related" or "*reasonably* necessary" — to impose its standard of absolute necessity. See, *e.g.*, *Brown Univ.*, 5 F.3d at 669, 678-679; U.S. Dep't of Justice & FTC, *Antitrust Guidelines for the Licensing of Intellectual Property* (1995), reprinted in 4 Trade Reg. Rep. ¶ 13,132 at 20,743. "The antitrust laws impose a standard of reasonableness, not a standard of absolute necessity." *National Football League* v. *North Am. Soccer League*, 459 U.S. 1074, 1079 (1982) (Rehnquist, J., dissenting from denial of certiorari).

and season lengths, it may restrict the coaching resources that members may use in NCAA-sanctioned contests. The number and quality of coaches affect the ultimate product of athletic competition in many ways. These include the availability of training for each athlete based on the ratio of athletes to coaches, the attractiveness of a college's athletic program to prospective recruits based on the availability of individual coaching, and the availability of experienced assistants to conduct team drills to free more senior coaches for other duties such as recruiting. See NCAA C.A. App. 342. As a commentator sympathetic to respondents has acknowledged, "schools that would invest more to hire more coaches would clearly perform on the field or court at a higher level." Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TUL. L. REV. 2631, 2654 (1996).

3. The Tenth Circuit denigrated the stated aim of the REC Rule to preserve some positions for entry-level coaches, on the ground that some experienced coaches would fill REC positions despite the low pay. App., *infra*, 20a-21a. But, before the REC Rule was proposed, the NCAA proposed to limit colleges to three basketball coaches without salary limits. See p. 4, *supra*. The REC Rule arose only after basketball coaches asked that the NCAA preserve some avenue of entry into Division I for coaches who could not successfully compete for higher salaried positions. The NCAA legitimately could do so without being second-guessed on the ground that not every single REC coach would be new to the profession. The development of coaches, no less than the development of athletes, is part of the NCAA's mission to provide the "product" of intercollegiate athletics.

Of course, a salary cap will not prevent some coaches, like respondent Jarvis, from selling their services for less money than they could command elsewhere for a while. But the tailoring between a restraint and a procompetitive benefit need not be perfect, and economic considerations eventually prevail. Over time, coaches who can earn more than $16,000 will move out of REC positions, and restricted earnings coaches will be less experienced than the others on a staff.

4. The court of appeals likewise rejected the cost containment rationale because the NCAA did not prove that reducing the number and compensation of restricted earnings coaches un-

questionably would reduce costs if schools chose to spend the money they saved on other aspects of the basketball program. App., *infra*, 24a. But reducing the cost of a personnel *position* that a school must fill to remain competitive cuts costs; doing so will *permit* some schools to funnel the savings into academic programs or other sports, even if not all schools *choose* to do so.

The Tenth Circuit did not believe that cost containment could legitimately justify the REC Rule at all (App., *infra*, 24a), but that view disregards the entire context of NCAA members' joint undertaking to provide competitive intercollegiate athletics for the benefit of spectators and students alike. Many colleges face opposing pressures to field well-coached competitive teams, to provide opportunities for a broad range of students to participate in intercollegiate sports, and to accomplish both of these goals on a tight budget. See *id.* at 79a (42% of Division I athletic programs operated at a deficit in 1985).

Several procompetitive benefits flow from controlling the costs necessary to maintain a competitive Division I basketball program. As the Oklahoma Supreme Court recognized in approving the original restrictions on coaches, "the rising costs of amateur athletics * * * and the ever increasing competitive imbalance [in] Division I" are closely connected. *Oklahoma Regents*, 561 P.2d at 507. Containing those costs fosters competitive balance by better enabling less affluent schools to provide the same athlete-coach ratio and to compete effectively for recruits.

Moreover, the NCAA "seeks to maintain * * * intercollegiate athletics, including coaching activities, as an integral part of th[e] educational program." *Oklahoma Regents*, 561 P.2d at 502. Controlling athletic department costs, in particular limiting the number of full-time salaried coaches, helps keep athletics from overshadowing the other functions of member schools and preserves the distinctive collegiate character of the product.

Finally, cost containment directed at individual sports allows colleges to devote funds to additional sports. Concern about "sports being dropped" underlay the cost-reduction inquiry that produced the REC Rule and other measures. See NCAA C.A. App. 162, 519. Cost containment helps to foster the diversity of competitive events that fans, students, and athletes demand.

* * * * *

Once the NCAA had advanced justifications for the REC Rule that were tied to the aims that this Court held were legitimately procompetitive, respondents should have had the burden to prove actual anticompetitive effects under a full rule-of-reason analysis. Because respondents could not meet that burden, the NCAA was entitled to summary judgment. At the very least, the case should have been set for trial.

The Tenth Circuit's requirement that a defendant *prove* that a restraint was "necessary" to serve — and *succeeded* in serving — a "compelling need" in order to put the plaintiffs to their proof of anticompetitive effects transforms the "quick look" into a rule of *per se* condemnation. This important question of burden allocation warrants review by this Court.

II. THIS CASE PRESENTS QUESTIONS OF EXCEPTIONAL IMPORTANCE TO ANTITRUST LAW AND INTERCOLLEGIATE ATHLETICS

The decision below deserves review by this Court because it creates multiple conflicts with other circuits and is, in many respects, flatly wrong. It also deserves review because it is exceptionally important, in terms both practical and doctrinal.

1. The decision "deserves careful scrutiny" because its "application threatens the entire structure of intercollegiate sports." Roberts, *supra*, 70 TUL. L. REV. at 2632. The decision undermines "[o]ne of the NCAA's primary reasons for existence — providing member schools with a way to make rules designed to keep any school from gaining a competitive advantage." *NCAA Reassesses Future After $67 Million Judgment*, WASH. POST, May 12, 1998, at E1. According to Professor Roberts, the case "opens the door for challenges to all NCAA rules. . . . Once you start down that path, the NCAA is at some risk of having any rule they have challenged." *Court Orders NCAA to Pay $67 Million*, WASH. POST., May 5, 1998, at E1, E2.[16]

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[16] Reflecting its importance, the decision of the district court, which the Tenth Circuit affirmed, has attracted substantial academic commentary. See, e.g., Roberts, *supra*, 70 TUL. L. REV. 2631 (1996); Sacks, *The Restricted Earnings Coach Under Sherman Act Review*, 4 SPORTS LAW. J. 13, 31 (1997); Yancey, *supra*; Dowd, Note, *Oligopsony Power: Antitrust Injury and Collusive Buyer Practices in Input Markets*, 76 B.U. L. REV. 1075, 1107-1110 (1996).

The NCAA cannot perform its "important role in the regulation of amateur intercollegiate sports" (*Board of Regents*, 468 U.S. at 88) under such a cloud. Rather, this Court has already recognized the "ample latitude" the NCAA needs to perform that role (*id.* at 120), latitude conspicuously absent from the Tenth Circuit's analysis. That court's sweeping decision threatens the survival of all rules limiting expenditures on inputs to an intercollegiate athletic program. One of respondents' lawyers already threatened a lawsuit if the NCAA attempts to reduce the number of paid coaches by replacing one position with a graduate assistant who could only be compensated with a grant-in-aid. *NCAA Loses Court Battle*, WASH. TIMES, July 29, 1995, at D1. Indeed, respondents have maintained (C.A. Br. 36 & n.15) that "the district court * * * issue[d] the injunction under appeal" precisely to *prevent* the NCAA from replacing the fourth paid coach with a graduate student. That is, in the view of plaintiffs and, apparently, the district court, any attempt by the NCAA to limit the number of paid professional coaches in any sport — even to replace them with *students* — would risk contempt sanctions.

Moreover, under the Tenth Circuit's flawed analysis, it can be seriously argued that "virtually all NCAA rules will have significant anticompetitive effects," and "virtually no substantive rule can survive" antitrust review. Roberts, *supra*, 70 TUL. L. REV. at 2671- 2672. If the decision below stands, disgruntled athletes who would like more or larger athletic scholarships may even file lawsuits in the hope that other courts will extend the Tenth Circuit's mistaken notion that the NCAA cannot defend rules that affect "price" unless they are absolutely "necessary to create the product of competitive college sports." App., *infra*, 20a; see Goplerud, *Pay for Play for College Athletes: Now, More Than Ever*, 38 S. TEX. L. REV. 1081, 1091-1092 (1997) (decision affirmed in this case supports the "notion that the limit on [athletic] scholarships and even a dollar-specific stipend would violate the antitrust laws"); *A $67 Million Blunder?*, SPORTS ILLUSTRATED, May 18, 1998, at 26 ("limits on the number of games a school can play" also at risk). In such a world, "maybe the only thing the NCAA will be able to do is set the width of the field and the height of the goal posts." *NCAA Reassesses Future*, *supra*, WASH. POST, May 12, 1998, at E8 (quoting general counsel

of American Council on Education). The NCAA will vigorously defend its existing rules — which courts have upheld in the past — yet the Tenth Circuit's broad reasoning encourages renewed, vexatious litigation against this non-profit organization.[17]

The decision below places in grave doubt the future of competitive intercollegiate athletics that are "identifi[ed] with an academic tradition" and thus are "differentiate[d]" from minor league professional sports. *Board of Regents*, 468 U.S. at 101-102. And it hamstrings the ability of the NCAA to implement any economic restrictions on *inputs* to intercollegiate athletic competition, substantially nullifying "the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics." *Id.* at 101. Further review is warranted in light of this Court's solicitude for that "important role." *Id.* at 88.

2. In addition, the unsettled questions presented here arise in the context of a legal doctrine — "quick look" analysis under the rule of reason — that has become exceptionally important to the administration of the antitrust laws. Since this Court last used a "quick look" analysis in *Indiana Dentists*, that method of review has brought the circuits into the conflicts set forth above.

The federal antitrust agencies have made clear their intent to rely extensively on "quick look" analysis. "An antitrust practitioner today can hardly pick up a new set of government guidelines or an agency enforcement speech without some reference to the so-called 'quick look' or 'truncated' rule of reason * * *." Keyte, *What It Is and How It Is Being Applied: The "Quick-Look" Rule of Reason,* ANTITRUST, Summer 1997, at 21. The Antitrust Division's Assistant Attorney General has advocated expanding the use of "quick look" analysis,[18] and the Director of

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[17] Indeed, the district court in this case, despite being the first court ever to invalidate an NCAA input restriction and despite the NCAA's long history of successful defenses, castigated the NCAA for its failure to show "repentance." *Law* v. *NCAA*, ___ F. Supp. ___, 1998 WL 230878 at *13 (D. Kan. Apr. 20, 1998).

[18] See, *e.g.*, Klein, *Point: A "Stepwise" Approach for Analyzing Horizontal Agreements Will Provide a Much Needed Structure for Antitrust Review*, ANTITRUST, Summer 1998, at 41.

the Federal Trade Commission's Bureau of Economics identified the "quick look" as one of the "hot topics" at that agency.[19]

Assistant Attorney General Klein has noted that disagreements among courts and commentators as to the proper scope and application of the "quick look" ensure that the current "debate will go forward" until it is resolved by this Court. See Klein, *A Stepwise Approach to Antitrust Review of Horizontal Agreements*, Remarks at the ABA Antitrust Section's Semi-annual Fall Policy Program, text at n.17 (Nov. 7, 1996). The Court should review this case to bring greater clarity and certainty to this increasingly important mode of analysis.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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[19] Jonathan Baker, Director, Bureau of Economics, FTC, *"Hot Topics" at the Federal Trade Commission*, Remarks before the ABA Section of Antitrust Law (Mar. 28, 1996); see also Cohen, *Per Se Illegality and Truncated Rule of Reason: The Search for a Foreshortened Antitrust Analysis*, FTC Staff Discussion Draft (Nov. 1997).

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JUNE 1998

APPENDIX

APPENDIX A

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, individually and on behalf of others similarly situated, Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant-Appellant,

and

William Hall, Amicus Curiae.

No. 96-3034.

United States Court of Appeals, Tenth Circuit.

Jan. 23, 1998.

William C. Barnard (Gayle A. Reindl, Donald C. Biggs and Mary T. Doherty, Sommer & Barnard, Indianapolis, IN; John J. Kitchin and Linda J. Salfrank, Swanson, Midgley, Gangwere, Kitchin & McLarney, Kansas City, MO, with him on the briefs) for Defendant-Appellant.

W. Dennis Cross (Lori R. Schultz, Morrison & Hecker, Kansas City, MO; Robert G. Wilson, Cotkin & Collins, Los Angeles, CA; and Gerald I. Roth, Allentown, PA, with him on the briefs) for Plaintiffs-Appellees.

Leonard B. Simon, Jan M. Adler, Dennis Stewart and Bonny E. Sweeney, Milberg, Weiss, Bershad, Hynes & Lerach, San Diego, CA; R. Lawrence Ward, Phillip W. Bledsoe, Shugart, Thomson, & Kilroy, Kansas City, MO; and Steven Beldsoe, Overland Park, KS, Shugart, Thomson, & Kilroy, on brief for Amicus Curiae.

Before EBEL, LOGAN, and KELLY, Circuit Judges.

EBEL, Circuit Judge.

Defendant-Appellant the National Collegiate Athletic Association ("NCAA") promulgated a rule limiting annual compensation of certain Division I entry-level coaches to $16,000. Basketball coaches affected by the rule filed a class action challenging the restriction under Section 1 of the Sherman Antitrust Act. The district court granted summary judgment on the issue of liability to the coaches and issued a permanent injunction restraining the NCAA from promulgating this or any other rules embodying similar compensation restrictions. The NCAA now appeals, and we affirm.

I. Background

The NCAA is a voluntary unincorporated association of approximately 1,100 educational institutions.[1] The association coordinates the intercollegiate athletic programs of its members by adopting and promulgating playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of student athletes, rules governing the size of athletic squads and coaching staffs, and the like. The NCAA aims to "promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics."

The NCAA classifies sports programs into separate divisions to reflect differences in program size and scope. NCAA Division I basketball programs are generally of a higher stature and have more visibility than Division II and III basketball programs. Over 300 schools play in Division I, and each Division I member hires and employs its own basketball coaches.

During the 1980s, the NCAA became concerned over the steadily rising costs of maintaining competitive athletic programs, especially in light of the requirements imposed by Title IX of the 1972 Education Amendments Act to increase

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[1] Because this appeal stems from the grant of a motion for summary judgment, we review the facts taken in the light most favorable to the NCAA, the non-moving party. *See Kaul* v. *Stephan*, 83 F.3d 1208, 1212 (10th Cir. 1996).

support for women's athletic programs. The NCAA observed that some college presidents had to close academic departments, fire tenured faculty, and reduce the number of sports offered to students due to economic constraints. At the same time, many institutions felt pressure to "keep up with the Joneses" by increasing spending on recruiting talented players and coaches and on other aspects of their sports programs in order to remain competitive with rival schools. In addition, a report commissioned by the NCAA known as the "Raiborn Report" found that in 1985 42% of NCAA Division I schools reported deficits in their overall athletic program budgets, with the deficit averaging $824,000 per school. The Raiborn Report noted that athletic expenses at all Division I institutions rose more than 100% over the eight-year period from 1978 to 1985. Finally, the Report stated that 51% of Division I schools responding to NCAA inquiries on the subject suffered a net loss in their basketball programs alone that averaged $145,000 per school.

Part of the problem identified by the NCAA involved the costs associated with part-time assistant coaches. The NCAA allowed Division I basketball teams to employ three full-time coaches, including one head coach and two assistant coaches, and two part-time coaches. The part-time positions could be filled by part-time assistants, graduate assistants, or volunteer coaches. The NCAA imposed salary restrictions on all of the part-time positions. A volunteer coach could not receive any compensation from a member institution's athletic department. A graduate assistant coach was required to be enrolled in a graduate studies program of a member institution and could only receive compensation equal to the value of the cost of the educational experience (grant-in-aid) depending on the coach's residential status (i.e. a non-resident graduate assistant coach could receive greater compensation to reflect the higher cost of out-state tuition than could an in-state student). The NCAA limited compensation to part-time assistants to the value of full grant-in-aid compensation based on the value of out-of-state graduate studies.

Despite the salary caps, many of these part-time coaches earned $60,000 or $70,000 per year. Athletic departments

circumvented the compensation limits by employing these part-time coaches in lucrative summer jobs at profitable sports camps run by the school or by hiring them for part-time jobs in the physical education department in addition to the coaching position. Further, many of these positions were filled with seasoned and experienced coaches, not the type of student assistant envisioned by the rule.

In January of 1989, the NCAA established a Cost Reduction Committee (the "Committee") to consider means and strategies for reducing the costs of intercollegiate athletics "without disturbing the competitive balance" among NCAA member institutions. The Committee included financial aid personnel, inter-collegiate athletic administrators, college presidents, university faculty members, and a university chancellor. In his initial letter to Committee members, the Chairman of the Committee thanked participants for joining "this gigantic attempt to save intercollegiate athletics from itself." It was felt that only a collaborative effort could reduce costs effectively while maintaining a level playing field because individual schools could not afford to make unilateral spending cuts in sports programs for fear that doing so would unduly hamstring that school's ability to compete against other institutions that spent more money on athletics. In January of 1990, the Chairman told NCAA members that the goal of the Committee was to "cut costs and save money." It became the consensus of the Committee that reducing the total number of coaching positions would reduce the cost of intercollegiate athletic programs.

The Committee proposed an array of recommendations to amend the NCAA's bylaws, including proposed Bylaw 11.6.4 that would limit Division I basketball coaching staffs to four members — one head coach, two assistant coaches, and one entry-level coach called a "restricted-earnings coach".[2] The restricted- earnings coach category was created to replace the

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[2] Bylaw 11.6.4 provided in pertinent part: Number Limits. There shall be a limit on the number of coaches that may be employed by an institution in each sport (other than football) as follows: Sport: Basketball, Men; Head or Assistant Coach: 3; Restricted-Earnings Coach: 1.

positions of part-time assistant, graduate assistant, and volunteer coach.[3] The Committee believed that doing so would resolve the inequity that existed between those schools with graduate programs that could hire graduate assistant coaches and those who could not while reducing the overall amount spent on coaching salaries.

A second proposed rule, Bylaw 11.02.3, restricted compensation of restricted-earnings coaches in all Division I sports other than football to a total of $12,000 for the academic year and $4,000 for the summer months (the "REC Rule" for restricted-earnings coaches).[4] The Committee determined that

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[3] The proposed rule included a "grandfather clause" exempting schools from the staffing limitations where academic tenure, enforceable written contracts, or formal security-of-employment commitments would make it impossible to comply with such limits.

[4] Bylaw 11.02.3 provided: Restricted-Earnings Coach. A restricted-earnings coach is any coach who is designated by the institution's athletics department to perform coaching duties and who serves in that capacity on a volunteer or paid basis with the following limitations on earnings derived from the member institution: (a) During the academic year, a restricted-earnings coach may receive compensation or remuneration from the institution's athletics department that is not in excess of either $12,000 or the actual cost of educational expenses incurred as a graduate student. (b) During the summer, a restricted-earnings coach may receive compensation or remuneration (total remuneration shall not exceed $4,000) from: (1) The institution's athletics department or any organization funded in whole or in part by the athletics department or that is involved primarily in the promotion of the institution's athletics program (e.g., booster club, athletics foundation association); (2) The institution's camp or clinic, (3) Camps or clinics owned or operated by institutional employees, or (4) Another member institution's summer camp. (c) During the summer or the academic year, the restricted-earnings coach may receive compensation for performing duties for another department or office of the institution, provided: (1) The compensation received for those duties outside the athletic department is commensurate with that received by others performing those same or similar assignments, (2) The ratio of compensation received for coaching duties and any other duties is directly proportionate to the amount of time devoted to the two areas of assignment, and (3) The individual is qualified for and is performing the

the $16,000 per year total figure approximated the cost of out-of-state tuition for graduate schools at public institutions and the average graduate school tuition at private institutions, and was thus roughly equivalent to the salaries previously paid to part-time graduate assistant coaches. The REC Rule did allow restricted-earnings coaches to receive additional compensation for performing duties for another department of the institution provided that (1) such compensation is commensurate with that received by others performing the same or similar assignments, (2) the ratio of compensation received for coaching duties and any other duties is directly proportional to the amount of time devoted to the two areas of assignment, and (3) the individual is qualified for and actually performs the duties outside the athletic department for which the individual is compensated. The REC Rule did not prevent member institutions from using savings gained by reducing the number and salary of basketball coaches to increase expenditures on other aspects of their athletic programs.

Supporting adoption of the REC Rule, the Committee stated:

> The largest expense item in the athletics budget is personnel. Currently, only football and basketball have limits on the number of coaches who may be employed, and the existing categorical designations of part-time graduate student and volunteer coach have not been effective in reducing the number of full-time paid employees associated with the sport. In addition, the committee recognizes the recent proliferation of part-time personnel associated with many Division I sports
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> Proposed limitations reflect an effort to (1) reduce the number of coaches associated with each sport by at least one full-time-equivalent position; (2) establish an

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duties outside the athletic department for which the individual is compensated. (d) Compensation for employment from a source outside the institution during the academic year or from sources other than those specified under 11.02.3-(b) and 11.02.3-(c) above during the summer shall be excluded from the individual's limit on remuneration.

> "unrestricted" head or assistant coach category that will accommodate any type of volunteer, paid, full-time or part-time coach; and (3) establish a "restricted earnings" category that will encourage the development of new coaches while more effectively limiting compensation to such coaches.

"Report of the NCAA Special Committee on Cost Reduction," Part Two, ¶ 1.

The NCAA adopted the proposed rules, including the REC Rule, by majority vote in January of 1991, and the rules became effective on August 1, 1992.[5] The rules bind all Division I members of the NCAA that employ basketball coaches. The schools normally compete with each other in the labor market for coaching services.

In this case, plaintiffs-appellees were restricted-earnings men's basketball coaches at NCAA Division I institutions in the academic year 1992-93. They challenged the REC Rule's limitation on compensation under section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1990), as an unlawful "contract, combination ... or conspiracy, in restraint of trade." They did not challenge other rules promulgated by the NCAA, including the restriction on the number of coaches. The district court exercised jurisdiction pursuant to 28 U.S.C. § 1337 (1993)[6] and 15 U.S.C. §§ 15 and 26 (1982).[7]

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[5] Other cost-saving measures were adopted that, *inter alia*, limited: * the number of coaches who could recruit off campus. * off-campus contacts with prospective student-athletes. * visits by prospective student-athletes. * printed recruiting materials. * the number of practices before the first scheduled game. * the number of games and duration of seasons. * team travel and training table meals. * financial aid grants to student-athletes.

[6] 28 U.S.C. § 1337 provides in relevant part: (a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

[7] 15 U.S.C. § 15 provides in relevant part: (a) Except as provided in subsection (b) of this section [regarding foreign states], any person who

The district court addressed the issue of liability before addressing issues of class certification and damages. Ruling on cross-motions for summary judgment, the court found the NCAA liable for violating section 1. Following the ruling, an administrative committee of the NCAA rescinded the compensation limits. However, the rescission was subject to ratification by NCAA members at their January 1996 meeting, and the appellate record does not reflect that such ratification ever occurred. Prior to the meeting, a new rule was proposed that would have eliminated the restricted-earnings coach position and replaced it with a position having similar compensation restrictions. On January 5, 1996, the district court, pursuant to 15 U.S.C. § 26, permanently enjoined the NCAA from enforcing or attempting to enforce any restricted-earnings coach salary limitations against the named plaintiffs, and it further enjoined the NCAA from "reenacting the compensation limitations embodied in [the REC Rule]." The NCAA appeals the permanent injunction.

II. Summary Judgment Review

Although this is an interlocutory appeal, we have appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1) (1993) because the NCAA seeks review of an order granting a permanent injunction.[8] In reviewing the injunction, we may also address the summary judgment order that served as the district court's

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shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. 15 U.S.C. § 26 provides in relevant part:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws.

[8] The relevant part of 28 U.S.C. § 1292(a) provides: [T]he courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts ... granting ... injunctions.

principal legal basis for granting the injunction because the district court's ruling on summary judgment was inextricably intertwined with its ruling granting a permanent injunction. *See Tri-State Generation & Transmission Ass'n, Inc. v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir.1989); *see also Moore v. City of Wynnewood*, 57 F.3d 924, 930 (10th Cir.1995) (court may consider pendent jurisdiction appeals beyond those authorized for interlocutory appeal if the issues are inextricably intertwined) (citing *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51, 115 S.Ct. 1203, 1212, 131 L.Ed.2d 60 (1995)).

Typically, we review a district court's grant of an injunction for abuse of discretion. *See United States v. Jenks*, 22 F.3d 1513, 1519 (10th Cir.1994). However, in this case, the NCAA challenges only that part of the injunction finding that it violated antitrust law.[9] The district court relied on its prior order granting summary judgment for that issue. We review de novo a summary judgment which serves as a basis for an injunction. *See id.* at 1517.

> Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. When applying this standard, we examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. If there is no genuine issue of material fact in dispute, then we next determine if the substantive law was correctly applied by the district court.
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> While the movant bears the burden of showing the absence of a genuine issue of material fact, the movant need not negate the non-movant's claim, but need only point to an absence of evidence to support the non-movant's claim. If the movant carries this initial burden, the non-movant

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[9] The NCAA does not challenge other portions of the order, such as the finding that a remedy at law would be insufficient.

> may not rest upon its pleadings, but must set forth specific facts showing a genuine issue for trial as to those dispositive matters for which it carries the burden of proof. An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant.

Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir.1996) (quoting *Wolf v. Prudential Ins. Co. of America*, 50 F.3d 793, 796 (10th Cir.1995) (further citations omitted)).

III. Rule of Reason Analysis

Section 1 of the Sherman Act provides, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." 15 U.S.C. § 1. Because nearly every contract that binds the parties to an agreed course of conduct "is a restraint of trade" of some sort, the Supreme Court has limited the restrictions contained in section 1 to bar only "unreasonable restraints of trade." *NCAA v. Board of Regents*, 468 U.S. 85, 98, 104 S.Ct. 2948, 2959, 82 L.Ed.2d 70 (1984); *see also Standard Oil Co. v. United States*, 221 U.S. 1, 52-60, 31 S.Ct. 502, 512-16, 55 L.Ed. 619 (1911). To prevail on a section 1 claim under the Sherman Act, the coaches needed to prove that the NCAA (1) participated in an agreement that (2) unreasonably restrained trade in the relevant market. *See Reazin v. Blue Cross & Blue Shield of Kan., Inc.*, 899 F.2d 951, 959 (10th Cir.1990). The NCAA does not dispute that the REC Rule resulted from an agreement among its members. However, the NCAA does contest the district court's finding that on the record before it, there was no genuine dispute of fact that the REC Rule is an unreasonable restraint of trade.

Two analytical approaches are used to determine whether a defendant's conduct unreasonably restrains trade: the *per se* rule and the rule of reason. *See SCFC ILC, Inc. v. Visa USA, Inc.*, 36 F.3d 958, 963 (10th Cir.1994). The *per se* rule condemns practices that "are entirely void of redeeming competitive rationales." *Id.* Once a practice is identified as illegal *per se*, a court need not examine the practice's impact on the market or the procompetitive justifications for the practice advanced by a defendant before finding a violation of

antitrust law. Rule of reason analysis, on the other hand, requires an analysis of the restraint's effect on competition. *See National Soc'y of Prof'l Engineers v. United States*, 435 U.S. 679, 695, 98 S.Ct. 1355, 1367, 55 L.Ed.2d 637 (1978). A rule of reason analysis first requires a determination of whether the challenged restraint has a substantially adverse effect on competition. *See SCFC*, 36 F.3d at 965; *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir.1993). The inquiry then shifts to an evaluation of whether the procompetitive virtues of the alleged wrongful conduct justifies the otherwise anticompetitive impacts. *See Brown Univ.*, 5 F.3d at 669. The district court applied the rule of reason standard to its analysis of the REC Rule.

Horizontal price-fixing is normally a practice condemned as illegal *per se*. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 436 n. 19, 110 S.Ct. 768, 782 n. 19, 107 L.Ed.2d 851 (1990) ("horizontal price-fixing ... has been consistently analyzed as a *per se* violation for many decades"); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940). By agreeing to limit the price which NCAA members may pay for the services of restricted-earnings coaches, the REC Rule fixes the cost of one of the component items used by NCAA members to produce the product of Division I basketball. As a result, the REC Rule constitutes the type of naked horizontal agreement among competitive purchasers to fix prices usually found to be illegal *per se*. *See, e.g., Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235, 68 S.Ct. 996, 1005-06, 92 L.Ed. 1328 (1948) (complaint alleging conspiracy among sugar refiners to purchase sugar-beets at agreed-upon prices sufficient to survive a motion for dismissal because the challenged conduct is precisely the type of activity condemned by section 1 of the Sherman Act); *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 426-27 (7th Cir.1965) (agreement among macaroni producers to limit amount of premium priced durum wheat purchased and to substitute specified percentage of inferior wheat in finished macaroni *per se* illegal because effect of restriction was effectively to reduce price of durum wheat that had risen as a result of a recent shortage).

However, the Supreme Court recognized in *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 23, 99 S.Ct. 1551, 1564, 60 L.Ed.2d 1 (1979), that certain products require horizontal restraints, including horizontal price-fixing, in order to exist at all. Faced with such a product — the ASCAP blanket music license which could not exist absent an agreement among artists to sell their rights at uniform prices — the Court held that a rule of reason analysis should be applied to the restraint. *Id.* at 24, 99 S.Ct. at 1564-65.

Subsequently, the Supreme Court in *NCAA v. Board of Regents*departed from the general treatment given to horizontal price-fixing agreements by refusing to apply a *per se* rule and instead adopting a rule of reason approach in reviewing an NCAA plan for televising college football that involved both limits on output and price-fixing. *See* 468 U.S. at 99-103, 104 S.Ct. at 2959-61. The Court explained:

> Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal *per se*" approach because the probability that these practices are anticompetitive is so high; a *per se* rule is applied "when the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement, on the fact that the NCAA is organized as a nonprofit entity, or on our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics. *Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.*

468 U.S. at 100-101, 104 S.Ct. at 2959-60 (quoting *Broadcast Music*, 441 U.S. at 19-20, 99 S.Ct. at 1562-63) (footnotes omitted and emphasis added).

The "product" made available by the NCAA in this case is college basketball; the horizontal restraints necessary for the

product to exist include rules such as those forbidding payments to athletes and those requiring that athletes attend class, etc. *See id.* at 101-02, 104 S.Ct. at 2960-61 (what a sports league and its members "market ... is competition itself.... Of course, this would be completely ineffective if there were no rules ... to create and define the competition to be marketed."). Because some horizontal restraints serve the procompetitive purpose of making college sports available, the Supreme Court subjected even the price and output restrictions at issue in *Board of Regents* to a rule of reason analysis. *See id.* at 103, 104 S.Ct. at 2961; *see also Hairston v. Pacific 10 Conference*, 101 F.3d 1315, 1318- 19 (9th Cir.1996) (employing rule of reason analysis and finding that imposing sanctions for violations of NCAA rules did not violate section 1 of the Sherman Act); *Banks v. NCAA*, 977 F.2d 1081, 1088-94 (7th Cir.1992) (upholding no-draft and no-agent eligibility rules for student athletes under rule of reason analysis); *Justice v. NCAA*, 577 F.Supp. 356, 379-82 (D.Ariz.1983) (NCAA sanctions against member institution imposed for violations of NCAA rule barring compensation of student athletes did not violate antitrust laws under rule of reason analysis).

Other courts also have applied a rule of reason analysis to sports league rules, *see* I ABA Section of Antitrust Law, *Antitrust Law Developments* 115-16 (4th ed.1997) (citing cases), including restraints otherwise given *per se* treatment, *see, e.g., M & H Tire Co., Inc. v. Hoosier Racing Tire Corp.*, 733 F.2d 973, 980 (1st Cir.1984) (applying rule of reason standard to a rule requiring all auto racing competitors to use the same tire and stating that "in the sports area various agreed-upon procedures may be essential to survival"). *See also* Phillip E. Areeda, *Antitrust Law* ¶ 1478d, at 359 (1986) (noting that courts "have not woodenly applied the *per se* prohibitions developed for ordinary business situations" to sports leagues).

Plaintiff coaches cite the Supreme Court's refusal to create exceptions to the *per se* treatment of price-fixing schemes in cases such as *Superior Court Trial Lawyers and Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 342, 102 S.Ct. 2466, 2472, 73 L.Ed.2d 48 (1982), and urge us to apply a *per*

se analysis to the NCAA rule at issue in this case. Since neither case dealt with a "product" such as college sports that requires horizontal restraints to exist, the cases are not persuasive here in light of the Supreme Court's analysis of NCAA price-fixing under a rule of reason in *Board of Regents*.

The coaches also argue that *Board of Regents* is distinguishable because the agreement in that case went to marketing the product itself — college sports — and because that agreement was closer to a joint venture because it involved a "joint selling arrangement." By contrast, they contend (1) that the hiring of coaches involves the market for coaching services, an input, rather than college sports, the output, and (2) that the price-fixing at issue in this case does not involve "joint buying" because each school independently hires its own coaches. The second point does not distinguish this case from *Board of Regents*. In *Board of Regents*, like the present case, each school negotiated *individually* with television networks within the constraints of price agreements. *See* 468 U.S. at 93, 104 S.Ct. at 2956.[10] The first point is similarly unpersuasive. *Board of Regents* does not turn on whether the agreement in question is based on input components or output products. Rather, *Board of Regents* more generally concluded that because horizontal agreements are necessary for sports competition, all horizontal agreements among NCAA members, even those as egregious as price- fixing, should be subject to

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[10] In several instances, the NCAA tries to style itself as a joint venture, arguing that joint ventures are entitled to more favorable treatment under the antitrust laws. However, the Supreme Court rejected categorizing the NCAA as a joint venture with respect to the television rights plan challenged in *Board of Regents* because the plan did not "eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations." 468 U.S. at 113, 104 S.Ct. at 2967. Here, the NCAA does not hire coaches for the teams. Rather the teams hire coaches individually, "albeit subject to fixed prices." Thus, the NCAA does not operate as a joint venture for the purposes of hiring assistant basketball coaches. As a result, we do not consider the question of how joint ventures should be treated under the antitrust laws.

a rule of reason analysis.[11] *See* 468 U.S. at 101-03, 104 S.Ct. at 2960-61.

Finally, the Supreme Court has made it clear that the *per se* rule is a "demanding" standard that should be applied only in clear cut cases. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50, 97 S.Ct. 2549, 2557-58, 53 L.Ed.2d 568 (1977); *accord Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 178, 86 S.Ct. 347, 351, 15 L.Ed.2d 247 (1965) ("[T]he area of *per se* illegality is carefully limited."). As a result, courts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product, even if such restraints involve horizontal price-fixing agreements. *See I* ABA Section of Antitrust Law, *supra*, at 49 (citing cases). Thus, we apply the rule of reason approach in this case.

Courts have imposed a consistent structure on rule of reason analysis by casting it in terms of shifting burdens of proof. *See* I ABA Section of Antitrust Law, *supra*, at 53 (citing cases). Under this approach, the plaintiff bears the initial burden of showing that an agreement had a substantially adverse effect on competition. *See Clorox Co. v. Sterling Winthrop, Inc.*, 117 F.3d 50, 56 (2d Cir.1997); *Hairston*, 101 F.3d at 1319; *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir.1996); *Brown Univ.*, 5 F.3d at 668; *see also* I ABA Section of Antitrust Law, *supra*, at 53, 55 (citing cases); Areeda, *supra*, ¶ 1502, at 371-72. If the plaintiff meets this burden, the burden shifts to the defendant to come forward with evidence of the procompetitive virtues of the alleged wrongful conduct. *See Clorox*, 117 F.3d at 56; *Hairston*, 101 F.3d at 1319; *Orson*, 79 F.3d at 1367-68; *Brown Univ.*, 5 F.3d at 669; *see also* I ABA Section of Antitrust Law, *supra*, at 53, 66 (citing cases); Areeda, *supra*, ¶ 1502, at 372. If the defendant is able to demonstrate procompetitive effects, the plaintiff then must prove that the challenged conduct is not reasonably necessary to achieve the legitimate objectives or that

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[11] Albeit often an abbreviated rule of reason analysis, as discussed below.

those objectives can be achieved in a substantially less restrictive manner. *See Clorox*, 117 F.3d at 56; *Hairston*, 101 F.3d at 1319; *Orson*, 79 F.3d at 1368; *Brown Univ.*, 5 F.3d at 669; I ABA Section of Antitrust Law, *supra*, at 53, 66. Ultimately, if these steps are met, the harms and benefits must be weighed against each other in order to judge whether the challenged behavior is, on balance, reasonable. *See* Areeda, *supra*, ¶ 1502, at 372.

A. Anticompetitive Effect

We first review whether the coaches in this case demonstrated anticompetitive effect so conclusively that summary judgment on the issue was appropriate. A plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market or directly by showing actual anticompetitive effects, such as control over output or price. *See Orson*, 79 F.3d at 1367; *Brown Univ.*, 5 F.3d at 668-69; *Bhan v. NME Hosp., Inc.*, 929 F.2d 1404, 1413 (9th Cir.1991). A naked, effective restraint on market price or volume can establish anticompetitive effect under a truncated rule of reason analysis. *See Chicago Prof'l Sports Ltd. Partnership v. National Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir.1992) (approving application of "quick look" rule of reason analysis that dispensed with market definition and assessment of market power in a case involving an output restriction established by the National Basketball Association).

The NCAA argues that the district court erred by failing to define the relevant market and by failing to find that the NCAA possesses power in that market. The NCAA urges that the relevant market in this case is the entire market for men's basketball coaching services,[12] and it presented evidence demonstrating that positions as restricted-earnings basketball coaches make up, at most, 8% of that market. Thus, the NCAA argues it has at least created a genuine issue of material

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[12] According to the NCAA, the relevant market would include, in addition to coaching positions in Division I schools, coaching positions in Division II and III schools, junior colleges, high schools, and professional teams.

fact about whether it possesses market power and that summary judgment was therefore inappropriate.

The NCAA misapprehends the purpose in antitrust law of market definition, which is not an end unto itself but rather exists to illuminate a practice's effect on competition. In *Board of Regents*, the Court rejected a nearly identical argument from the NCAA that a plan to sell television rights could not be condemned under the antitrust laws absent proof that the NCAA had power in the market for television programming. *See* 468 U.S. at 109, 104 S.Ct. at 2964. "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, 'no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'" *Id.* (quoting *National Soc'y of Prof'l Engineers*, 435 U.S. at 692, 98 S.Ct. at 1365). No "proof of market power" is required where the very purpose and effect of a horizontal agreement is to fix prices so as to make them unresponsive to a competitive marketplace. *See id.* at 110, 104 S.Ct. at 2965. Thus, where a practice has obvious anticompetitive effects — as does price-fixing — there is no need to prove that the defendant possesses market power. Rather, the court is justified in proceeding directly to the question of whether the procompetitive justifications advanced for the restraint outweigh the anticompetitive effects under a "quick look" rule of reason. *See Chicago Prof'l Sports*, 961 F.2d at 674.

We find it appropriate to adopt such a quick look rule of reason in this case. Under a quick look rule of reason analysis, anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces. *See* Gary R. Roberts, The *NCAA, Antitrust, and Consumer Welfare*, 70 Tul. L.Rev. 2631, 2636-39 (1996) (citing *Board of Regents*, 468 U.S. at 109-10, 104 S.Ct. at 2964-65). Under this standard,

the undisputed evidence supports a finding of anticompetitive effect. The NCAA adopted the REC Rule to reduce the high cost of part-time coaches' salaries, over $60,000 annually in some cases, by limiting compensation to entry-level coaches to $16,000 per year. The NCAA does not dispute that the cost-reduction has effectively reduced restricted-earnings coaches' salaries. Because the REC Rule was successful in artificially lowering the price of coaching services, no further evidence or analysis is required to find market power to set prices. Thus, in the case at bar, the district court did not need to resolve issues of fact pertaining to the definition of the relevant market in order to support its decision on summary judgment that the REC Rule is a naked price restraint.

The NCAA contends that the district court misapplied *Board of Regents*, a case in which the Court had before it detailed factual findings that resulted from a trial. The NCAA is right about the procedural posture of *Board of Regents*, but wrong about its significance. In *Board of Regents* the Supreme Court relied on the district court's findings that the television plan in fact resulted in horizontal price restraints. *See* 468 U.S. at 99-100, 104 S.Ct. at 2959-60. Because the REC Rule is a horizontal price restraint on its face, similar factual findings are not required in this case. Further, although in *Board of Regents* the Court found that the parties had proven factually that the NCAA had market power in the defined market of college football, the Court said that as a matter of law it did not need to analyze market power because horizontal price restraints are so obviously anticompetitive. *Id.* at 109-10, 104 S.Ct. at 2964-65.

Finally, the NCAA cites *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir.1977) (per curiam). In *Hennessey*, assistant football and basketball coaches challenged a NCAA bylaw limiting the number of assistant coaches member institutions could employ at any one time. *See id.* at 1141- 42. The Fifth Circuit upheld the rule, concluding that the plaintiff failed to show that the rule was an unreasonable restraint of trade after weighing the anticompetitive effects with the procompetitive benefits of the restriction. *See id.* at 1153-54.

Hennessey is not controlling for a variety of reasons. First, the REC Rule is distinguishable from the agreement at issue in *Hennessey*. *Hennessey* addresses a restriction on the number of assistant coaches that a Division I school could employ whereas the REC Rule limits salary of a certain category of coaches. Therefore, the analysis of the reasonableness of the restraint in *Hennessey*, which did not involve a naked restriction on price, will not control the analysis of the reasonableness of the REC Rule.[13]

Second, the *Hennessey* court placed the burden of showing the unreasonableness of the coaching restriction in that case on the plaintiff and then found that the plaintiff could not make such a showing because the rule had only recently been implemented. *See id.* In our analysis, the plaintiff only has the burden of establishing the anticompetitive effect of the restraint at issue. Once the plaintiff meets that burden, which the coaches have done in this case by showing the naked and effective price-fixing character of the agreement, the burden shifts to the defendant to justify the restraint as a "reasonable" one. *See* I ABA Section of Antitrust Law, *supra*, at 66 (citing cases). It is on this step that the defendant NCAA stumbles. Thus, we disagree with the Fifth Circuit's allocation of the burden of proof in *Hennessey*, and we note that this shift in the burden of proof could explain the difference in outcome between our case and *Hennessey*.

Third, *Hennessey* predates the Supreme Court's opinion in *Board of Regents*. The Fifth Circuit very well may have reached a different result in *Hennessey* if it had the benefit of that precedent, because *Board of Regents* suggests a less deferential approach to the NCAA than the approach taken in *Hennessey*. Finally, of course, *Hennessey* is not Tenth Circuit precedent, and accordingly is not binding authority on us.

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[13] Indeed, plaintiffs do not challenge the restrictions on the number of coaches included in the NCAA's bylaws.

B. Procompetitive Rationales

Under a rule of reason analysis, an agreement to restrain trade may still survive scrutiny under section 1 if the procompetitive benefits of the restraint justify the anticompetitive effects. *See Clorox*, 117 F.3d at 56; *Hairston*, 101 F.3d at 1319; *Orson*, 79 F.3d at 1368; *Brown Univ.*, 5 F.3d at 669; *see also* I ABA Section of Antitrust Law, *supra*, at 53, 66; Areeda, supra, ¶ 1502, at 371-72. Justifications offered under the rule of reason may be considered only to the extent that they tend to show that, on balance, "the challenged restraint enhances competition." *Board of Regents*, 468 U.S. at 104, 104 S.Ct. at 2961.

In *Board of Regents* the Supreme Court recognized that certain horizontal restraints, such as the conditions of the contest and the eligibility of participants, are justifiable under the antitrust laws because they are necessary to create the product of competitive college sports. *Id.* at 117, 104 S.Ct. at 2968-69. Thus, the only legitimate rationales that we will recognize in support of the REC Rule are those necessary to produce competitive intercollegiate sports. The NCAA advanced three justifications for the salary limits: retaining entry-level coaching positions; reducing costs; and maintaining competitive equity. We address each of them in turn.

1. Retention of Entry-Level Positions

The NCAA argues that the plan serves the procompetitive goal of retaining an entry-level coaching position. The NCAA asserts that the plan will allow younger, less experienced coaches entry into Division I coaching positions. While opening up coaching positions for younger people may have social value apart from its affect on competition, we may not consider such values unless they impact upon competition. *See Superior Court Trial Lawyers*, 493 U.S. at 423-24, 110 S.Ct. at 774-76 (rejecting argument by trial lawyers that boycott of court-appointed work was justified to promote the social value of increasing the quality of representation); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 462-64, 106 S.Ct. 2009, 2019-21, 90 L.Ed.2d 445 (1986) (refusing to consider ethical policy of insuring proper dental care as a valid procompetitive end); *Board of Regents*, 468 U.S. at 117, 104 S.Ct. at 2968-69

(rejecting justifications offered to support a challenged restraint that do not promote competition as "inconsistent with the basic policy of the Sherman Act"); *National Soc'y of Prof'l Engineers*, 435 U.S. at 695-96, 98 S.Ct. at 1367-68 (holding that policy goals such as protecting public safety and promoting ethical behavior do not qualify as legitimate procompetitive objectives unless they serve to "regulate and promote" competition); *see also* Areeda, *supra*, ¶ 1504, at 381 (courts should "not inquire whether the restraint promotes the 'public interest' but only whether it increases competition.").[14]

The NCAA also contends that limiting one of the four available coaching positions on a Division I basketball team to an entry level position will create more balanced competition by barring some teams from hiring four experienced coaches instead of three. However, the REC Rule contained no restrictions other than salary designed to insure that the position would be filled by entry-level applicants; it could be filled with experienced applicants. In addition, under the REC Rule, schools can still pay restricted-earnings coaches more than $16,000 per year by hiring them for physical education or other teaching positions. In fact, the evidence in the record tends to demonstrate that at least some schools designated persons with many years of experience as the restricted-earnings coach. The NCAA did not present any evidence showing that restricted-earnings positions have been filled by entry-level applicants or that the rules will be effective over time in accomplishing this goal. Nothing in the record suggests that the salary limits for restricted-earnings coaches will be effective at creating entry-level positions. Thus, the NCAA failed to present a triable issue of fact as to whether preserving entry-level positions served a legitimate procompetitive end of balancing competition.

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[14] Similarly, the NCAA cannot be heard to argue that the REC Rule fosters the amateurism that serves as the hallmark of NCAA competition. While courts should afford the NCAA plenty of room under the antitrust laws to preserve the amateur character of intercollegiate athletics, *see Banks*, 977 F.2d at 1089-93, courts have only legitimized rules designed to ensure the amateur status of student athletes, not coaches.

2. Cost Reduction

The NCAA next advances the justification that the plan will cut costs. However, cost-cutting by itself is not a valid procompetitive justification. If it were, any group of competing buyers could agree on maximum prices. Lower prices cannot justify a cartel's control of prices charged by suppliers, because the cartel ultimately robs the suppliers of the normal fruits of their enterprises. *See* Areeda, *supra*, ¶ 1504, at 379. Further, setting maximum prices reduces the incentive among suppliers to improve their products. Likewise, in our case, coaches have less incentive to improve their performance if their salaries are capped. As the Supreme Court reiterated in *Superior Court Trial Lawyers*, 493 U.S. at 423, 110 S.Ct. at 775, "the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services ... This judgment recognizes that all elements of a bargain — quality, service, safety, and durability — and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." (internal quotations omitted).

The NCAA adopted the REC Rule because without it competition would lead to higher prices. The REC Rule was proposed as a way to prevent Division I schools from engaging in behavior the association termed "keeping up with the Joneses," i.e., competing. However, the NCAA cannot argue that competition for coaches is an evil because the Sherman Act "precludes inquiry into the question whether competition is good or bad." *National Soc'y of Prof'l Engineers*, 435 U.S. at 695, 98 S.Ct. at 1367.

While increasing output, creating operating efficiencies, making a new product available, enhancing product or service quality, and widening consumer choice have been accepted by courts as justifications for otherwise anticompetitive agreements, mere profitability or cost savings have not qualified as a defense under the antitrust laws. *See* I ABA Section of Antitrust Law, *supra*, at 66- 67 (citing cases). The NCAA's cost containment justification is illegitimate because the NCAA:

> [I]mproperly assumes that antitrust law should not apply to condemn the creation of market power in an input market. The exercise of market power by a group of buyers virtually always results in lower costs to the buyers — a consequence which arguably is beneficial to the members of the industry and ultimately their consumers. If holding down costs by the exercise of market power over suppliers, rather than just by increased efficiency, is a procompetitive effect justifying joint conduct, then section 1 can never apply to input markets or buyer cartels. That is not and cannot be the law.

Roberts, supra, at 2643. Reducing costs for member institutions, without more, does not justify the anticompetitive effects of the REC Rule.

The NCAA argues that reducing costs can be considered a procompetitive justification because doing so is necessary to maintain the existence of competitive intercollegiate sports. Emphasizing the deficits many college sports programs faced prior to the adoption of the REC Rule, the NCAA quotes with approval language from the opinion in *Hennessey* to support its claim that reducing costs serves as a procompetitive benefit:

> Colleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics. Financial pressures upon many members, not merely to "catch up", but to "keep up," were beginning to threaten both the competitive, and the amateur, nature of the programs, leading quite possibly to abandonment by many. "Minor" and "minority" sports were viewed as imperiled by concentration upon the "money makers," such as varsity football and basketball.
>
> Bylaw 12-1 [the rule at issue in *Hennessey*] was, with other rules adopted at the same time, intended to be an "economy measure". In this sense it was both in design and effect one having commercial impact. But the fundamental objective in mind was to preserve and foster competition in intercollegiate athletics-by curtailing, as it were, potentially monopolistic practices by the more

> powerful-and to reorient the programs into their traditional role as amateur sports operating as part of the educational process.

564 F.2d at 1153.

We are dubious that the goal of cost reductions can serve as a legally sufficient justification for a buyers' agreement to fix prices even if such cost reductions are necessary to save inefficient or unsuccessful competitors from failure. Nevertheless, we need not consider whether cost reductions may have been required to "save" intercollegiate athletics and whether such an objective served as a legitimate procompetitive end because the NCAA presents no evidence that limits on restricted-earning coaches' salaries would be successful in reducing deficits, let alone that such reductions were necessary to save college basketball. Moreover, the REC Rule does not equalize the overall amount of money Division I schools are permitted to spend on their basketball programs. There is no reason to think that the money saved by a school on the salary of a restricted-earnings coach will not be put into another aspect of the school's basketball program, such as equipment or even another coach's salary, thereby increasing inequity in that area. *Accord Board of Regents*, 468 U.S. at 118-19, 104 S.Ct. at 2969-70 (rejecting NCAA's argument that television rights plan would increase competitive equity among NCAA teams where the plan did not "regulate the amount of money that any college may spend on its football program").

3. Maintaining Competitiveness

We note that the NCAA must be able to ensure some competitive equity between member institutions in order to produce a marketable product: a "team must try to establish itself as a winner, but it must not win so often and so convincingly that the outcome will never be in doubt, or else there will be no marketable 'competition.'" Michael Jay Kaplan, Annotation, *Application of Federal Antitrust Laws to Professional Sports*, 18 A.L.R. Fed. 489 § 2(a) (1974). The NCAA asserts that the REC Rule will help to maintain competitive equity by preventing wealthier schools from placing a more experienced, higher-priced coach in the position of restricted-earnings coach. The NCAA again cites *Hennessey*

to support its position, and again we find *Hennessey* to be unpersuasive for the reasons previously articulated.

While the REC Rule will equalize the salaries paid to entry-level coaches in Division I schools, it is not clear that the REC Rule will equalize the experience level of such coaches.[15] Nowhere does the NCAA prove that the salary restrictions enhance competition, level an uneven playing field, or reduce coaching inequities. Rather, the NCAA only presented evidence that the cost reductions would be achieved in such a way so as to maintain without "significantly altering," "adversely affecting," or "disturbing" the existing competitive balance. The undisputed record reveals that the REC Rule is nothing more than a cost-cutting measure and shows that the only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance. Thus, on its face, the REC Rule is not directed towards competitive balance nor is the nexus between the rule and a compelling need to maintain competitive balance sufficiently clear on this record to withstand a motion for summary judgment.[16]

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[15] For example, some more-experienced coaches may take restricted-earnings coach positions with programs such as those at Duke or North Carolina, despite the lower salary, because of the national prominence of those programs. In fact, absent the REC Rule, the market might produce greater equity in coaching talent, because a school with a less-prominent basketball program might be able to entice a more-experienced coach away from a prominent program by offering a higher salary.

[16] Because we hold that the NCAA did not establish evidence of sufficient procompetitive benefits, we need not address question of whether the plaintiffs were able to show that comparable procompetitive benefits could be achieved through viable, less anticompetitive means. *See* I ABA Section of Antitrust Law, *supra*, at 66 (collecting cases); Areeda, *supra*, ¶ 1502, at 372 (if the defendant proves procompetitive justifications, the plaintiff must demonstrate that less restrictive means could have been used to achieve the same results to prevail under the rule of reason analysis).

4. Wait and See

In the alternative, the NCAA argues that even if evidence of the procompetitive benefits of the REC Rule are not forthcoming at the moment, we should follow the advice of the court in *Hennessey* and adopt a "wait and see" approach to give the rule time to succeed. *See* 564 F.2d at 1153-54 (refusing to place the burden on the NCAA to prove that the procompetitive benefits of the challenged restraint in that case outweighed its negative effects because doing so would "foreclose ... any opportunity to build up experience on which the issue ultimately could be judged"). However, we believe that the court in *Hennessey* erred as a matter of law to the extent that the court tried to free the NCAA as the defendant from its burden of showing that the procompetitive justifications for a restraint on trade outweigh its anticompetitive effects. The Supreme Court in *Board of Regents* made it clear that the NCAA still shoulders that burden, *see* 468 U.S. at 104, 104 S.Ct. at 2961-62, and we hold that the NCAA failed to provide sufficient evidence to carry its burden in this case.

IV. Conclusion

For the reasons discussed above, we AFFIRM the district court's order granting a permanent injunction barring the NCAA from reenacting compensation limits such as those contained in the REC Rule based on its order granting summary judgment to the plaintiffs on the issue of antitrust liability.

APPENDIX B

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., Charles M. Rieb, Doug Schreiber, Lazaro Collozzo, Robin Dreizler, Frank Cruz, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant-Appellant.

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, individually and on behalf of others similarly situated, Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant-Appellant,

No. 96-3150, 96-3186 and 96-3200.

United States Court of Appeals, Tenth Circuit.

Jan. 23, 1998.

William C. Barnard (Donald C. Biggs, Gayle A. Reindl and Mary T. Doherty, also of Sommer & Barnard, Indianapolis, IN; John J. Kitchin and Linda J. Salfrank of Swanson, Midgley, Gangwere, Kitchin & McLarney, Kansas City, MO, with him on the briefs), for Defendant-Appellant.

W. Dennis Cross (Lori R. Schultz, also of Morrison & Hecker, Kansas City, MO; Robert G. Wilson of Cotkin & Collins, Los Angeles, CA; and Gerald I. Roth, Allentown, PA, with him on the briefs), for Plaintiffs-Appellees.

Before EBEL, LOGAN and KELLY, Circuit Judges.

LOGAN, Circuit Judge.

Defendant National Collegiate Athletic Association (NCAA) has filed interlocutory appeals of the district court's

orders imposing interim attorneys' fees (Nos. 96-3150 and 96-3186) and sanctions (No. 96-3200) in this antitrust action.

Plaintiffs are "restricted earnings" college sports coaches who alleged that an NCAA rule limiting their compensation violated Section 1 of the Sherman Anti-trust Act, 15 U.S.C. §§ 1-7. The district court granted summary judgment for plaintiffs on liability, leaving significant issues related to damages for later determination. When the court believed the NCAA was about to act contrary to the summary judgment order, it permanently enjoined the NCAA from enforcing its compensation limits. The NCAA appealed the permanent injunction which we affirm today in a separate opinion. *See Law v. NCAA*, 134 F.3d 1010 (10th Cir.1998).

I

Nos. 96-3150 and 96-3186

After determining that plaintiffs were entitled to interim attorneys' fees as substantially prevailing parties, in an order entered April 18, 1996, the district court ordered the NCAA to pay by April 29 the sum of $380,682.82 in attorneys' fees plus expenses. That order directed the parties to consult to determine the fees due to another of plaintiffs' law firms and ordered the NCAA to pay those fees also by April 29. Instead of paying, the NCAA filed an appeal on April 29 (No. 96-3150). In a May 3 hearing the district court set the amount and ordered payment of those attorneys' fees it had not determined in its April 18 order. The NCAA appealed that decision on May 20 (No. 96- 3186). We hold that under the particular circumstances of this case we have discretion to hear the appeals of the interim attorneys' fees awards. We exercise that discretion to accept the appeals and affirm the awards.

An award of interim attorneys' fees is not a final order and thus generally is not appealable. *See, e.g., Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. Wisconsin*, 829 F.2d 601, 602 (7th Cir.1987); *Hastings v. Maine-Endwell Cent. Sch. Dist.*, 676 F.2d 893, 895-96 (2d Cir.1982); *Ruiz v. Estelle*, 609 F.2d 118, 119-20 (5th Cir.1980). Under the collateral order doctrine, however, such orders may be appealed if a party is ordered to pay fees immediately and there is a likelihood that

party will not be able to recover those fees if the case is reversed on appeal. *See, e.g., Palmer v. City of Chicago*, 806 F.2d 1316, 1320 (7th Cir.1986). The NCAA concedes that the interim fee awards here do not meet the requirements of the collateral order doctrine. Instead, it argues that we have pendent appellate jurisdiction to review the awards because the NCAA has filed a valid appeal of the court's permanent injunction order. *See Snell v. Tunnell*, 920 F.2d 673, 676 (10th Cir.1990) (holding that we had pendent appellate jurisdiction over an otherwise nonappealable district court decision that was closely related to an appealable decision).

A recent decision of the Supreme Court, *Swint v. Chambers County Comm'n*, 514 U.S. 35, 115 S.Ct. 1203, 131 L.Ed.2d 60 (1995), held that interlocutory appeals should be limited to those expressly provided for by Congress, including (1) under 28 U.S.C. § 1292(b) when a district court certifies an issue for immediate appeal; and (2) pursuant to rules created by the Supreme Court according to its authority from the Rules Enabling Act. *Id.* at 45-48, 115 S.Ct. at 1209-11. The Court expressed a concern that even if there were practical considerations of judicial economy supporting appellate jurisdiction "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay ... collateral orders into multi-issue interlocutory appeal tickets." *Id.* at 49-50, 115 S.Ct. at 1211. The Court, however, left open the possibility of pendent appellate jurisdiction if an otherwise nonappealable decision is "inextricably intertwined" with the appealable decision, or if review of the nonappealable decision is "necessary to insure meaningful review" of the appealable one. *Id.* at 51, 115 S.Ct. at 1212.

In *Moore v. City of Wynnewood*, 57 F.3d 924 (10th Cir.1995), we addressed the extent to which *Swint* narrowed pendent appellate jurisdiction. The plaintiff in *Moore* sued a city and its police chief under § 1983 alleging that plaintiff was demoted for statements he made during a public meeting, in violation of his First Amendment rights. Both defendants appealed the district court's denial of their summary judgment motion in which they asserted that there was no First Amendment violation and that the chief was entitled to

qualified immunity. We had jurisdiction, under *Mitchell v. Forsyth*, 472 U.S. 511, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985), to review the chief's appeal of the summary judgment order denying him qualified immunity. Addressing that appeal, we held the chief was entitled to qualified immunity because the plaintiff failed to show a violation of his First Amendment rights. The city, of course, was not entitled to qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980). Hence we could consider its appeal only if authorized under pendent appellate jurisdiction as "inextricably intertwined" with the other appeal.

Addressing whether we could or should exercise jurisdiction over the city's interlocutory appeal, we recognized first that whether to exercise pendent appellate jurisdiction is a matter for the discretion of the appellate court. *Moore*, 57 F.3d at 929; *see also In re: Tutu Wells Contamination Litigation*, 120 F.3d 368, 382 (3d Cir.1997) ("The doctrine of pendent appellate jurisdiction, in its broadest formulation, allows an appellate court in its discretion to exercise jurisdiction over issues that are not independently appealable but that are intertwined with issues over which the appellate court properly and independently exercises its jurisdiction."). In *Moore* we concluded that "a pendent appellate claim can be regarded as inextricably intertwined with a properly reviewable claim on collateral appeal only if the pendent claim is coterminous with, or subsumed in, the claim before the court on interlocutory appeal — that is, when the appellate resolution of the collateral appeal necessarily resolves the pendent claim as well." 57 F.3d at 930. We then reasoned that the city's appeal was "inextricably intertwined" with the individual defendant's appeal because our holding that plaintiff did not establish a First Amendment violation by the police chief disposed of plaintiff's First Amendment claims against the city. Hence, we accepted jurisdiction and ruled in favor of the city.

In the instant case the only issue in the NCAA's appeal of the permanent injunction (No. 96-3034) was the correctness of the district court's summary judgment order finding the NCAA

liable for a violation of the antitrust laws.[1] We, of course, have now upheld the district court's determination on that issue. Our resolution of that issue also determines the merits of the appeals of the awards of interim attorneys' fees, because the only issue the NCAA raises in those appeals is whether plaintiff was a prevailing party.[2] Plaintiffs were certainly the prevailing parties in the district court, based on the court's summary judgment determination in their favor; but the NCAA hoped to prevail on appeal and was resisting payment of the fees on that ground alone. Thus, as we held in *Moore* the two appeals are inextricably intertwined.[3]

There are other issues that might have been raised in an appeal of interim attorneys' fees. Had the amount been contested or other issues raised this would have constituted one

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[1] The district court made it clear that it awarded the fees based on the summary judgment on the question of liability and not the permanent injunction order, see Appellant's App. 207, but that does not settle the question. In disposing of the permanent injunction appeal this panel essentially reviewed the summary judgment.

[2] *See City of Chanute, Kansas v. Williams Natural Gas Co.*, 31 F.3d 1041, 1047 (10th Cir.1994) (defining prevailing party as (1) one gaining some relief on the merits of their claim or (2) one acting as significant catalyst causing defendant to change position if that change was required by law). A "party which achieves the objective of its suit by means of an injunction issued by the district court is a prevailing party in that court." *Dahlem v. Board of Educ. of Denver Pub. Schools*, 901 F.2d 1508, 1512 (10th Cir.1990) (footnote omitted).

[3] The NCAA points out that a motions panel of this court in granting the motion for approval of a supersedeas bond and a stay of the sanctions regarding the attorneys' fees appeal stated that "[t]he interim attorney's fee award is inextricably intertwined with the appeal from the permanent injunction in this case." Appellant's App. 371. The NCAA asserts that this statement resolves the issue as law of the case. A decision of a motions panel, however, is not binding on the merits panel. *See Stifel, Nicolaus & Co. v. Woolsey & Co.*, 81 F.3d 1540, 1543-44 (10th Cir.1996) (appeals court reviews prior motions panel decision "uninhibited by the law of the case doctrine"). We thus do not consider the statement by the motions panel to control our decision on this issue.

of those parlays "into multi-issue interlocutory appeal tickets" condemned in *Swint*. *See* 514 U.S. at 49-50, 115 S.Ct. at 1211-12. In the instant case, however, the NCAA did not contest the reasonableness of the fees or raise any other issue that would prohibit our taking jurisdiction. Therefore, we exercise our discretion to accept the appeals. Because we have affirmed the district court's determination that the restricted earnings coach policy the NCAA imposed on its member institutions violates the antitrust laws and because the parties agree that a prevailing plaintiff in an antitrust action is entitled to reasonable attorneys' fees under Section 16 of the Clayton Act, 15 U.S.C. § 16, we AFFIRM the interim attorneys' fee awards.

II

No. 96-3200

The NCAA also appeals the sanctions imposed by the district court for its failure to pay the interim attorneys' fees by the April 29, 1996 date the court ordered. We hold that we have jurisdiction over the appeal of the sanctions. We find the daily fines imposed on the NCAA for the period before the court's May 3 hearing to be criminal contempt, imposed without following essential procedures; therefore, we reverse and set aside those amounts. We find the remaining sanctions to be civil contempt and within the district court's authority to impose, and therefore we affirm them.

The first district court order awarding interim attorneys' fees was entered April 18, 1996, and directed the NCAA to pay them by April 29. Instead of paying, on April 29 the NCAA filed a notice of appeal to this court and a motion with the district court for a stay and for approval of a supersedeas bond. Believing—correctly as we hold—that the NCAA had no absolute right to appeal the interlocutory order, the district court refused the stay and refused to set bond. When the NCAA still did not pay, on May 1 plaintiffs filed a motion for sanctions against the NCAA. The district court held a hearing on May 3, set and ordered payment of additional attorneys' fees, and reaffirmed its prior oral denial of the stay and bond motion. It imposed daily sanctions of $5,000 on the NCAA, payable to plaintiffs, retroactive to April 30, increasing to

$10,000 daily if not paid in full by May 9. On May 7, this court granted the NCAA's motion for a supersedeas bond and stayed the sanctions order.

As a general rule, an order imposing sanctions is not immediately appealable. *See G.J.B. & Assocs., Inc. v. Singleton*, 913 F.2d 824, 827-29 (10th Cir.1990) (counsel may not file an interlocutory appeal from the imposition of sanctions); *D & H Marketers, Inc. v. Freedom Oil & Gas, Inc.*, 744 F.2d 1443, 1446 (10th Cir.1984) (parties may not file an interlocutory appeal from the imposition of sanctions). The NCAA argues, however, that the order constitutes an order of criminal contempt and therefore is immediately appealable. *See Consumers Gas & Oil, Inc. v. Farmland Indus., Inc.*, 84 F.3d 367, 370 (10th Cir.1996) ("an adjudication of criminal contempt is a final order appealable prior to final judgment") (quoting *Pro-Choice Network of Western New York v. Walker*, 994 F.2d 989, 994 (2d Cir.1993)). Our jurisdiction thus depends on whether the district court's order constituted civil or criminal contempt. The analysis we applied in the companion case decided today, *Law v. NCAA*, 134 F.3d 1010 (10th Cir.1998), resolves this issue.

The district court's sanction order imposed a daily fine. A fine is a civil sanction only if it is compensatory or coercive. *See id.* at 1015. Here the $5,000 (or $10,000) daily fine is not compensatory, even though ordered paid to plaintiffs. In the instant case, the NCAA was not given the opportunity to purge the fines imposed for the period April 30 through May 3. We reject plaintiffs' argument — in which it relied on *Pro-Choice Network* — that the district court forewarned the NCAA it might be sanctioned, and thus the fine ultimately imposed was coercive and civil. In *Pro-Choice Network*, the defendants were held in contempt of court for violating a restraining order that specifically provided the defendants would be held in contempt and fined a fixed amount if they violated the order; the Second Circuit held the fines were civil because they had been imposed prospectively. *See* 994 F.2d at 995. The instant case is distinguishable; the court only mentioned the possibility of sanctions and did not set any amount until after the NCAA's act. *See, e.g., Lamar Fin. Corp. v. Adams*, 918 F.2d 564 (5th

Cir.1990) (defendants refused to comply with court order to produce documents; court found them in contempt and fined them retroactive to date they refused production and prospectively until they produced the documents; appeals court held that the retroactive portion was criminal). Thus, we hold that insofar as the fines applied to the period April 30 through May 3 the fines were not coercive, and hence they were criminal.

As to the daily fines from May 4 until our stay order of May 7, the NCAA had the opportunity to avoid the sanctions by paying the attorneys' fee awards; thus this portion was coercive and civil. Although a contempt order or judgment is characterized as either civil or criminal depending upon its primary purpose, *Hicks v. Feiock*, 485 U.S. 624, 638 n. 10, 108 S.Ct. 1423, 1433 n. 10, 99 L.Ed.2d 721 (1988), when, as here, a contempt order contains both a punitive and a coercive dimension, for purposes of appellate review it will be characterized as a criminal contempt order. *Lamar Fin. Corp.*, 918 F.2d at 566. As such, it is appealable as a final judgment under 28 U.S.C. § 1291. We thus have appellate jurisdiction to review the entire sanction order. *See FDIC v. LeGrand*, 43 F.3d 163, 170 (5th Cir.1995); *Spindelfabrik Suessen-Schurr v. Schubert & Salzer*, 903 F.2d 1568, 1578-79 (Fed.Cir.1990).

"Criminal contempt is a crime in the ordinary sense, and criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings." *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 826-27, 114 S.Ct. 2552, 2556, 129 L.Ed.2d 642 (1994) (citations and quotations omitted). The degree of procedural safeguards required for criminal contempt proceedings varies based on the seriousness of the penalty, see id., but notice is a basic requirement for any criminal contempt proceeding. The court failed to give notice that the proceedings on May 3 would be of a criminal nature, as required by Fed.R.Crim.P. 42(b) which provides that "[a] criminal contempt ... shall be prosecuted on notice .... [which] shall state the essential facts constituting the criminal contempt charged and describe it as such." Fed.R.Crim.P. 42(b). Although the district court had informed

counsel orally on April 29 that it would "favorably entertain a motion for sanctions" if the NCAA failed to comply, *see* Appellant's App. 233, that notice was not explicit, *see FTC v. Gladstone*, 450 F.2d 913, 916 (5th Cir.1971); it did not communicate to the NCAA that the hearing was a criminal proceeding. *See LeGrand*, 43 F.3d at 169 (notice of hearing must "specifically state that the hearing will be a criminal contempt proceeding," unless "the offending conduct ... [is] such that it can only be punished by punitive or criminal sanctions"); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 798-99, 107 S.Ct. 2124, 2132-33, 95 L.Ed.2d 740 (1987). Because the procedures required of criminal contempt proceedings were not followed here, we REVERSE the sanctions imposed for the period of April 30 through May 3.

The NCAA asserts that the prospective coercive sanction imposed for the period after May 3 was erroneous. The NCAA's argument is based on its belief that it had a right to appeal and hence a right to a stay if it was able to file a sufficient supersedeas bond. It argues that Fed.R.Civ.P. 62(d) provides district courts with only a ministerial duty in approving bonds.

The NCAA's argument fails primarily because it had no *right* to appeal the interim attorneys' fee awards. It could ask this appellate court to take its appeal. But whether we would do so depended upon both an exercise of our discretion and a determination that our decision on the related injunction appeal necessarily resolved the appeal the NCAA sought to take. When there is no appeal of right there is no duty on the district court to grant a stay upon the filing of a supersedeas bond.

The NCAA can find no solace in Fed.R.Civ.P. 62. As applied to the injunction order that was appealable of right, Rule 62(c) gives discretion to the district court whether to issue a stay during the pendency of the appeal. If discretion is given to the district court when the order is appealable of right, it would be incongruous to read Rule 62(d) to require a stay upon presentation of a supersedeas bond when the appeal must piggy-back on the injunction appeal, and depends on an exercise of discretion by the appellate court.

The NCAA's proper course of action, if it sought to avoid or delay paying the interim fee awards, would be to follow the dictates of Fed. R.App. P. 8. It first should have sought a stay in the district court before April 29, and when the district court refused, then applied, as it did belatedly, in this court. The application to this court required us to make a preliminary decision whether we would consider the appeal sufficiently intertwined with the appeal of the injunction to grant the appeal.

In the instant circumstances, if we were to set aside the civil sanctions — when we have affirmed the district court's holding on the antitrust liability of the NCAA and the interim attorneys' fee awards — we would undermine the district court's authority to apply coercive sanctions to enforce its proper orders.

We REVERSE the district court's daily fine sanctions insofar as they apply to the period April 30 through May 3. We AFFIRM the daily fine sanctions as they apply to the period May 4 through May 6, before this court's stay order. In view of our determination herein we RESCIND our stay of the daily sanctions the district court ordered, effective twenty-four hours after this court's mandate issues with respect to the instant appeal.

APPENDIX C

Norman LAW, et al., Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

William HALL, On Behalf of Himself and All Others Similarly Situated, Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

Doug SCHREIBER, et al., Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

Civil Action Nos. 94-2053-KHV, 94-2392-KHV, 95-2026-KHV.

United States District Court, D. Kansas.

April 30, 1997.

ORDER GRANTING CLASS CERTIFICATION

Plaintiffs' joint motion for class certification came on for hearing before this Court at 9:00 a.m. on April 18, 1997. Appearing for plaintiffs in *Law, et al. vs. NCAA* and *Schreiber, et al. v. NCAA* were Morrison & Hecker, L.L.P. by W. Dennis Cross and Lori R. Schultz, and Cotkin & Collins, A Professional Corporation, by Robert G. Wilson. Appearing for plaintiff in *Hall vs. NCAA* and on behalf of proposed intervenor Linda Myers were Milberg Weiss Bershad Hynes & Lerach LLP, by Dennis Stewart and Bonny E. Sweeney. Appearing for defendants in all three cases were Sommer & Barnard, PC, by William C. Barnard and Gayle A. Reindl and

Swanson Midgley Gangwere Kitchin & McLarney LLC, by John J. Kitchin and Linda J. Salfrank.

The Court, after reviewing the memoranda and evidence submitted by the parties in support of and in opposition to the motion finds, with respect to each of the proposed classes, as follows:

1. The members of the class are so numerous that joinder of all class members in these cases is impracticable.

2. There are questions of law and fact common to the class which predominate over questions affecting only individual members.

3. The claims of the representative parties are typical of the claims of the class.

4. The representative parties listed below will fairly and adequately protect the interests of the class.

5. A class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Having so found, IT IS ORDERED THAT these actions may, respectively, be maintained as class actions under Fed. R. Civ. P. 23(b)(3) on behalf of the following classes:

Law v. NCAA: *Class One (Men's Basketball)*:

All persons employed on a paid basis at any time during the period from August 1, 1992 to the present as "restricted earnings" coaches in NCAA Division I men's basketball programs.

Schreiber v. NCAA: Class Two (Baseball):

All persons employed on a paid basis at any time during the period from August 1, 1992 to the present as "restricted earnings" coaches in NCAA Division I men's baseball programs.

Hall v. NCAA: Class Three (All Other Sports):

All persons employed on a paid basis at any time during the period from August 1, 1992 to the present as "restricted earnings" coaches in the following NCAA Division I sports: women's basketball; men's or women's fencing; field hockey; men's football (Division I-AA and for employees of National Service Academies only,

Division I-A); men's or women's cross-country; men's or women's golf; men's or women's gymnastics; ice hockey; men's or women's lacrosse; men's or women's rifle; men's or women's skiing; men's or women's soccer; softball; men's or women's swimming and diving; men's or women's tennis; men's or women's track and field; men's or women's volleyball; water polo; and wrestling.

The Court further approves as class representatives, the following parties:

Law v. NCAA: Norman Law, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr. and Charles Rieb.

Schreiber v. NCAA: Doug Schreiber, Lazaro Collazo and Robin Dreizler.

Hall v. NCAA: William Hall and Linda Myers.

The Court appoints counsel for the classes as follows:

(1) *Law v. NCAA* and *Schreiber v. NCAA*:

W. Dennis Cross and Lori R. Schultz of Morrison & Hecker L.L.P.; Robert G. Wilson of Cotkin & Collins, A Professional Corporation; and Gerald I. Roth of the Law Offices of Gerald I. Roth.

(2) *Hall v. NCAA*:

Dennis Stewart and Bonny E. Sweeney of Milberg Weiss Bershad Hynes & Lerach LLP; and R. Lawrence Ward and Philip W. Bledsoe of Shughart Thomson & Kilroy, P.C.

6. On or before May 2, 1997, the parties shall submit to the Court for its approval a proposed Notice of Pendency (the "Notice"), a plan for dissemination of the Notice to class members and a questionnaire to be distributed to class members with the Notice.

IT IS SO ORDERED.

Dated: April 29, 1997 /s/ Kathryn H. Vratil
United States District Judge

APPENDIX D

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, Individually and on Behalf of All Others Similarly Situated, Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

No. 94-2053-KHV.

United States District Court, D. Kansas.

May 10, 1996.

Lori R. Schultz, W. Dennis Cross, Morrison & Hecker L.L.P., Kansas City, MO, Robert G. Wilson, Cotkin & Collins, Los Angeles, CA, Gerald I. Roth, Allentown, PA, for plaintiffs.

Linda J. Salfrank, John J. Kitchin, Swanson, Midgley, Gangwere, Kitchin & McLarney, L.L.C., Kansas City, MO, Craig T. Kenworthy, Swanson, Midgley, Gangwere, Kitchin & McLarney, L.L.C., Overland Park, KS, Alan I. Rothenberg, William J. Meeske, Latham & Watkins, Los Angeles, CA, William C. Barnard, Gayle A. Reindl, Sommer & Barnard, P.C., Indianapolis, IN, for defendant.

MEMORANDUM AND ORDER

VRATIL, District Judge.

This matter comes before the Court on plaintiffs' Motion for Class Certification (Doc. # 130), filed September 15, 1995. Plaintiffs move the Court to declare that this action may be maintained as a class action under Fed.R.Civ.P. 23; certfy a plaintiff class consisting of all persons who since August 1, 1992, have been employed by Division I members of the NCAA as restricted earnings coaches in the sport of men's basketball; and designate the named plaintiffs as class representatives. With some limitations, the Court hereby gants plaintiffs' motion as to the injunctive aspects of the case

On April 15, 1994, at the request of the National Collegiate Athletic Association ("NCAA"), the Court decided to defer the issue of class certification pending discovery and dispositive motions on the issue of liability. Both sides subsequently filed and argued such motions and on August 2, 1995, this Court entered its amended Memorandum and Order (Doc. # 110), sustaining plaintiffs' motion for summary judgment and finding in particular that the NCAA is liable for violating Section 1 of the Sherman Act. In direct response to that order, the NCAA Administrative Committee temporarily rescinded the restricted earnings coach rule. On January 5, 1996, the Court entered a permanent injunction (Doc. # 213) in favor of plaintiffs Peter Herrmann and Michael Jarvis, Jr.,[1] prohibiting the NCAA from reenacting the limitations embodied in the restricted earnings coach rule or enforcing such limitations against them. Because of various delays in discovery since the Court's summary judgment rulings, plaintiffs have still not received the information which they allegedly need from the NCAA to support their theory on damages. Consequently, the parties have not yet submitted expert reports on the issue.

Discussion

Plaintiffs seek to certify a class composed of:

> All persons employed during the period from August 1, 1992 to the present time as third assistant or "restricted earnings" coaches in men's varsity basketball programs within colleges and universities that are members of NCAA Division I.

NCAA Bylaws 11.02.3, 11.3.4 and 11.7.4, adopted in January 1991 and effective in August 1992, created the restricted earnings coach category. Those bylaws (collectively, the "restricted earnings coach rule") limited to $12,000 the compensation that any restricted earnings coach could receive during the academic year and limited to $4,000 the

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[1] Herrmann and Jarvis are the two named plaintiffs who were employed as restricted earnings coaches at the time the Court entered its permanent injunction.

compensation that any such coach could receive for summer work from the employer institution, from any member institution's summer camp or clinic, or from any summer camp or clinic owned or operated by institutional employees.

The named plaintiffs either have been or currently are employed in those positions formerly known as restricted earnings coaches. They range in age from approximately 25 to 56, and their years of coaching experience vary from the beginner level to that of experienced coach. All plaintiffs and all proposed class members proceed on the same legal theories and base their claims on the same restricted earnings coach rule and the same overall course of conduct by the NCAA and its members.

I. Price Fixing Actions and Class Treatment

The Supreme Court has long recognized the importance of private actions in antitrust enforcement. *See, e.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 344, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139, 88 S.Ct. 1981, 1984, 20 L.Ed.2d 982 (1968). In actions such as this, which allege that a number of people have been injured by a price fixing conspiracy, the aggregate injury typically is great, but the cost of litigation makes separate prosecution of individual claims economically unfeasible. Such cases are thus particularly appropriate for class action treatment. *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262, 266, 92 S.Ct. 885, 891, 893, 31 L.Ed.2d 184 (1972); *Greenhaw v. Lubbock Cty. Beverage Ass'n*, 721 F.2d 1019, 1024 (5th Cir.1983).

The decision whether to certify an action as a class action is committed to the discretion of the trial court. *Anderson v. City of Albuquerque*, 690 F.2d 796, 799 (10th Cir.1982); *Olenhouse v. Commodity Credit Corp.*, 136 F.R.D. 672, 679 (D.Kan.1991). In exercising its discretion, the district court should construe Rule 23 liberally and resolve all doubts in favor of class certification. Id., citing *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir.1968), cert. denied, 394 U.S. 928, 89 S.Ct. 1194, 22 L.Ed.2d 459 (1969).

II. Requirements of Rule 23(a)

Fed.R.Civ.P. 23(a) sets forth four prerequisites to class certification, all of which are satisfied in this case.

A. Numerosity

Rule 23(a)(1) requires that "the class [be] so numerous that joinder of all members is impracticable." The numerosity requirement calls for a practical judgment based on the particular facts of each case. *Independent School Dist. No. 89 v. Bolain Equip., Inc.*, 90 F.R.D. 245, 247 (W.D.Okla.1980); *Chmieleski v. City Prods. Corp.*, 71 F.R.D. 118, 151 (W.D.Mo.1976). Thus there is no set formula for determining whether the numerosity requirement is met. *In re Aluminum Phosphide Antitrust Litigation*, 160 F.R.D. 609, 612-13 (D.Kan.1991).

The party seeking class certification need not show the exact size of the class. *Albertson's, Inc. v. Amalgamated Sugar Co.*, 62 F.R.D. 43, 52 (D.Utah 1973). One court has applied a "rough rule of thumb" that 40 class members is enough to satisfy the numerosity requirement, *Wilcox Dev. Co. v. First Interstate Bank*, 97 F.R.D. 440, 443 (D.Ore.1983), while another court found 13 members sufficient. *Dale Elec., Inc. v. RC.L. Elecs., Inc.*, 53 F.R.D. 531, 534-36 (D.N.H.1971).

The NCAA has approximately 300 Division I members. The restricted earnings coach rule limits all Division I members to three assistant coaches in men's basketball, and one of them must be designated a restricted earnings coach. Substantially all of the Division I schools employed a restricted earnings coach while the rule was in effect, and that position had frequent turnover in employment.[2] Thus the total number of individuals in the proposed class probably exceeds 300.

In addition, the members of the proposed class are geographically dispersed throughout the United States. Because this circumstance adds to the difficulty and impracticability of

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[2] There is no evidence before the Court that the total number of third assistant coaches, formerly known as restricted earnings coaches, has been reduced since the temporary rescission of the rule.

joinder, such geographical dispersion is another factor weighing in favor of class certification. *See, e.g., Viking Travel, Inc. v. Air France*, 1982-2 Trade Cas. (CCH) P 64,915 (E.D.N.Y.1982); *In re Home Stake Prod. Co. Securities Litigation*, 76 F.R.D. 351, 356 (N.D.Okla.1977). Given the large number and geographical dispersion of the members of the alleged class, the Court finds that the numerosity requirement is satisfied.

B. Commonality

The next requirement of Rule 23(a) is that there be questions of law or fact common to the class. Each member of the proposed class bases his claim on the same set of facts and circumstances—the restricted earnings coach rule, the NCAA's adoption of that rule at its annual convention in 1991, the NCAA members' rationale for adopting the rule and the effect the members intended the rule to have. The rule became applicable to each class member at the same time, on August 1, 1992. Plaintiffs claim that the rule has affected the compensation of every restricted earnings coach in the same manner, though not in the same amount.[3]

All members of the proposed class similarly base their claims on the same legal theories and authority. In fact, the NCAA has not suggested — and the Court does not believe — that the law on which the Court relied in sustaining plaintiffs' motion for summary judgment applies with less force to the dispositive issues facing each of the proposed members of the class than it does to the named plaintiffs.

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[3] Defendant claims that the rule did not affect every restricted earnings coach in the same manner and that it did not affect some coaches at all. For example, the NCAA notes that certain coaches made less than the $16,000 salary cap both before and after the restricted earnings coach rule and that such coaches could not have been injured by the salary limitations. Plaintiffs counter that according to their economic expert, even coaches who made less than the $16,000 cap were adversely affected by working in a restrained market, and the artificial salary cap measurably depressed salaries not only at or near the cap but even at levels well beneath it. As discussed herein, the Court has not yet had the benefit of plaintiffs' expert methodology, and it cannot hazard a guess which position has more merit.

"Antitrust price fixing conspiracy cases, by their nature, deal with common legal and factual questions about the existence, scope and effect of the alleged conspiracy." *Cumberland Farms, Inc. v. Browning-Ferris Indus., Inc.*, 120 F.R.D. 642 (E.D.Pa.1988); *see also In re Alcoholic Beverages Litigation*, 95 F.R.D. 321, 324 (E.D.N.Y.1982) ("The very nature of the case — involving allegations of antitrust conspiracy among defendants — appears to insure that the commonality requirement is satisfied"); *Albertson's*, 62 F.R.D. at 52 ("the only issue as to liability, the [price fixing] conspiracy, is common to the whole class").

The fact that this Court has already resolved many of the common questions does not affect this analysis. The class certification determination should be made without considering the merits of the underlying claims; the only question is whether the requirements of Fed.R.Civ.P. 23 have been met. *Anderson v. Albuquerque*, 690 F.2d 796, 799 (10th Cir.1982); *Aluminum Phosphide*, 160 F.R.D. at 612. Indeed, even if the Court were to take the merits of the case and the Court's decision regarding liability into account in making its class certification determination, those factors would strengthen rather than weaken plaintiffs' argument for commonality. The Court finds that plaintiffs have satisfied the commonality requirement.

C. Typicality

The third requirement of Rule 23(a) is that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Specifically, ... the "class representative must be a class member, must have no interest antagonistic to those of the class, and must have suffered the same injury as the other class members." ... Claims may be typical without being identical.... The representative's claim may differ factually and still be typical of the class if it arises from the same events or course of conduct and shares the same legal or remedial theory.

Edgington v. R.G. Dickinson and Co., 139 F.R.D. 183, 189 (D.Kan.1991) (citations omitted). *See also Olenhouse*, 136 F.R.D. at 680. As mentioned, the named plaintiffs' claims arise from the same events or course of conduct and share the same

legal and remedial theories as those of the rest of the proposed class.

Like commonality, typicality results directly from the nature of plaintiffs' claims. In *In re Chlorine and Caustic Soda Antitrust Litigation*, 116 F.R.D. 622 (E.D.Pa.1987), the court granted the plaintiffs' request to certify the class, noting that typicality was inherent in the nature of the claim asserted:

> Plaintiffs seek to recover treble damages from defendants measured by the alleged overcharge resulting from defendants' conspiracy to fix prices. In order to prevail on the merits in this case the plaintiffs will have to prove the same major elements that the absent members of the class would have to prove. Those elements are a conspiracy, its effectuation and resulting damages. As such, the claims of the plaintiffs are not antagonistic to and are typical of the claims of the other class members.

Id. at 626; *see also Albertson's*, 62 F.R.D. at 52. Since the named plaintiffs must prove the same major elements that the other members of the proposed class must prove, and since the NCAA has indicated no reason why their interests are antagonistic to one another, the Court finds that the typicality requirement is met.

D. Fair and Adequate Representation

In order to show that they will fairly and adequately protect the interests of the class, the representative plaintiffs must show that (1) they are able to prosecute the action vigorously through qualified counsel and (2) there is no conflict between their interests and those of the class members. *Olenhouse*, 136 F.R.D. at 680.

Even the NCAA cannot dispute that plaintiffs are willing and able to prosecute this case vigorously through exceedingly well-qualified counsel. Plaintiffs' counsel in fact have already obtained summary judgment and partial injunctive relief in favor of their clients. In addition, the NCAA suggests no conflict between the named plaintiffs and other class members which gives the Court reason to doubt whether the named

plaintiffs can adequately and fairly protect and represent the interests of all members of the proposed class.[4]

Even the NCAA cannot genuinely dispute that plaintiffs meet the requirements of Rule 23(a) for class certification. Defendant thus focuses its objections to class certification on the requisites under Rule 23(b). The Court thus turns to a discussion of those requirements and plaintiffs' efforts to meet them.

III. Requirements of Rule 23(b)

In addition to meeting the requirements of Rule 23(a) for class certification, plaintiffs must show compliance with Rule 23(b). Plaintiffs claim that they satisfy two of the three qualifying tests to determine whether a class action may be maintained — Rule 23(b)(2) and Rule 23(b)(3).

A. Rule 23(b)(2)

Rule 23(b)(2) provides that an action may be maintained as a class action if the requirements of Rule 23(a) are met and if the party opposing certification has acted or refused to act on grounds generally applicable to the class, thereby making injunctive or declaratory relief appropriate with respect to the class as a whole. By fixing maximum compensation levels for all coaches in the restricted earnings category, the NCAA acted on grounds generally applicable to the proposed class, thereby making injunctive and declaratory relief appropriate with

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[4] Defendant objects to plaintiffs Law, Rieb and Greer as class representatives. First, defendant notes that Rieb was paid less than the salary cap, before and after the restricted earnings coach rule took effect, and that he could not have been damaged by the alleged restraint of trade. Therefore, the NCAA maintains that Rieb is not an appropriate representative for a class seeking money damages for such violation of the antitrust laws. The Court need not address that contention, since it is not certifying the damage aspects of the case at this time. Defendant also argues that Law, Rieb and Greer have changed jobs since the rule took effect, and that they cannot be suitable class representatives for the injunctive aspects of the case. The Court has no evidence before it that those three plaintiffs plan to reenter the market for an entry level Division I basketball coaching job. Therefore, the Court declines at this time to name them as class representatives for the injunctive aspects of this case.

respect to the class as a whole. There is no question that the restricted earnings coach rule was intended to and did apply generally to the class as a whole. Indeed, that was its stated purpose. Plaintiffs seek a declaration from this Court that the rule is unlawful and an injunction preventing the NCAA from reenacting it or adopting any similar rule in the future.

Defendant argues that certification under Rule 23(b)(2) is inappropriate in this case for two reasons.

1. Predominant Relation to Money Damages

First, defendant points out, injunctive relief cannot serve as a basis for class certification where the relief sought relates predominantly to money damages. *See, e.g., Wilcox Development Co. v. First Interstate Bank*, 97 F.R.D. 440, 445 (D.Or.1983); *Viking Travel, Inc. v. Air France*, 1982-2 Trade Cas. (CCH) at 72,671; *Doninger v. Pacific Northwest Bell*, 564 F.2d 1304, 1314 (9th Cir.1977). Any contrary rule, defendant notes, would allow plaintiffs to circumvent the requirements of Rule 23(b) by simply requesting an injunction.

However, defendant points to no evidence that plaintiffs' claims in this litigation relate predominantly to money damages. Although plaintiffs have indeed requested money damages, they have also prayed for injunctive relief from the outset of this litigation. The Court observes no indication that plaintiffs merely appended such prayer for relief to a transcendent claim for money damages in order to circumvent the requirements of Rule 23(b)(3). Quite the contrary, plaintiffs have urged all along in this lawsuit the importance of being allowed to negotiate their employment contracts and salaries in an unrestrained market. Moreover, defendant's claim that plaintiffs have suffered little or no monetary damage as a result of the restricted earnings coach rule cuts directly against their assertion that this lawsuit is primarily about money damages. The Court therefore finds that the relief sought in this case is not predominantly related to damages, but rather, relates at least equally to an injunctive remedy.

The Court also recognizes that where the money damages sought are substantial and not merely incidental to the injunctive relief requested, certification of the entire action

under Rule 23(b)(2) is seldom appropriate. *See, e.g., Hernandez v. United Fire Ins. Co.*, 79 F.R.D. 419, 429 (D.Ill.1978); *Driver v. Helms*, 74 F.R.D. 382, 404-05 (D.R.I.1977); *Robertson v. National Basketball Ass'n*, 389 F.Supp. 867, 900 (S.D.N.Y.1975). Therefore the Court has determined to proceed under Rule 23(c)(4)(A) and certify a class only with respect to the injunctive and declaratory aspects of the case.

Rule 23(c)(4)(A) permits a class action to be brought or maintained with respect to particular issues. Indeed,

> [t]he theory of Rule 23(c)(4)(A) is that the advantages and economies of adjudicating issues that are common to the entire class on a representative basis should be secured even though other issues in the case may have to be litigated separately by each class member. Accordingly, even if only one common issue can be identified as appropriate for class action treatment, that is enough to justify the application of the provision as long as the other Rule 23 requirements have been met.

7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure: Civil 2d, § 1790, at 271 (1986). The decision to treat the injunctive and declaratory aspects of the case as a class action and to take the damages issues up separately obviates all of defendant's objections to class treatment except one.

2. Rescission of Restricted Earnings Coach Rule

Defendant asserts that class certification under Rule 23(b)(2) is inappropriate because the Administrative Committee of the NCAA has rescinded the restricted earnings coach rule. Thus, defendant argues that plaintiffs' claim for injunctive relief is attenuated because plaintiffs are not threatened with immediate and irreparable harm. This argument addresses the merits underlying plaintiffs' claim for declaratory and injunctive relief, and the merits are not before the Court on this motion for class certification. The only question the Court should consider in making its class certification determination is whether the requirements of Rule 23 have been met.

Anderson, 690 F.2d at 799. The Court accordingly finds that this action is suitable for class treatment under Rule 23(b)(2).

B. Rule 23(b)(3)

Rule 23(b)(3) provides that a class action is maintainable when the Court finds that the criteria of Rule 23(a) have been met, that the "questions of law or fact common to the members of the class predominate over any questions affecting only individual members," and that a class action is "superior to other available methods for the fair and efficient adjudication of the controversy."

The NCAA argues that common questions do not predominate and that a class action would be unmanageable and thus not superior to other alternatives. Defendant notes that each plaintiff must prove the fact of injury and the amount of individual damages suffered as a result of the restricted earnings coach rule. Defendant contends that the individual issues would therefore overwhelm the common issues, overtax the Court's resources, and abuse the class action mechanism.

Plaintiffs counter that their economic expert will demonstrate through a statistical model at trial the injury and amount of damages that each plaintiff has suffered. They argue that the individual issues will not overwhelm the common questions and posit that the class action is the best way to proceed.

Having certified the class for purposes of injunctive relief under Rule 23(b)(2), the Court need not address defendant's contentions in depth at this time. Plaintiffs bear the burden of proving that this action should be maintained as a class action. Naked assurances that a manageable method for dealing with individual issues will be found and presented at trial are not sufficient to meet this burden. Plaintiffs' inability to present a fuller picture of their expert's methodology is due in large part, however, to the NCAA's failure to comply with discovery deadlines and orders imposed by this Court. The Court may well revisit the issue of class certification under Rule 23(b)(3) once discovery is complete. But at this point, the Court's concerns about manageability outweigh plaintiffs' promises. At

this time, the Court cannot certify the proposed class under Rule 23(b)(3) as to the damages issues in the case.

IT IS THEREFORE ORDERED that plaintiffs' Motion for Class Certification (Doc. # 130), filed on September 15, 1995, is sustained as to plaintiffs' claim for injunctive relief and is denied in all other respects.

IT IS FURTHER ORDERED that this action may be maintained as a class action under Fed.R.Civ.P. 23(b)(2) as to plaintiffs' claim for injunctive relief, and a plaintiff class consisting of all persons who are currently employed or will in the future be employed by any Division I member of the NCAA in the position of third assistant coach, formerly known as "restricted earnings coach," in the sport of men's varsity basketball is hereby certified.

IT IS FURTHER ORDERED that named plaintiffs Peter Herrmann and Michael Jarvis, Jr. are hereby designated as class representatives.

APPENDIX E

Norman LAW, et al., Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

No. 94-CV-2053

United States District Court,
D. Kansas.

TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that on this 5th day of May, 1996, the above-entitled matter can regularly on for hearing before the Honorable Kathryn H. Vratil, in Room 476 at the Federal Building, 500 State, Kansas City, Kansas.

APPEARANCES

The Plaintiff appears by and through his attorneys of record, W. Dennis Cross and Lori Schultz, of Morrison & Hecker, 2600 Grand Avenue, Kansas City, Missouri, 64108-4606.

The Defendant appears by and through his Attorneys of record, William C. Barnard, of Sommer & Barnard, P.C., 4000 Bank One Tower, Post Office Box 44363, Indianapolis, Indiana, 46244-0363; and Linda Salfrank, of Swanson, Midgley, Gangwere, Kitchin & McLarney, LLC, 922 Walnut, Suite 1500, Kansas City, Missouri, 64106-1848.

THE COURT: Good morning.

MR. CROSS: Good morning, Your Honor.

MR. BARNARD: Good morning, Your Honor.

THE COURT: We are here to take up defendant's motion for approval of a supersedeas bond and stay of an interim fee award. We are also here on the plaintiff's motion for sanctions, and I would like to make a brief record on defendant's objection to the amount of interim fees claimed by Cotkin and Collins.

Counsel, please state your appearances.

MR. CROSS: Dennis Cross and Lori Schultz for the plaintiffs, Your Honor.

MR. BARNARD: William Barnard from Sommer & Barnard and Linda Salfrank from the Sanson, Midgley firm for the defendant.

THE COURT: I think I covered this when we spoke on this conversation on Monday, April 29th, but we didn't have a court reporter and, therefore, just for the record, I would like to overrule defendant's objection to the amount of interim attorney's fees claimed by Cotkin and Collins. The Court's intent not withstanding perhaps imprecise language was that the NCAA would pay both the fees and expenses and, therefore, the amount, as I understand the parties' agreement, would be $66,185.03; is that right?

MR. BARNARD: I think that is right. I don't have those papers in front of me and we were just literally reading Your Honor's language when we took the position we took, and now that you have clarified it there is no problem.

THE COURT: All right.

APPENDIX F

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, Individually and on Behalf of All Others Similarly Situated, Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

Doug SCHREIBER, Lazaro Collazo, Robin Dreizler and Frank Cruz, Individually and on Behalf of All Others Similarly Situated, Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

Civ. A. Nos. 94-2053-KHV, 95-2026-KHV.

United States District Court, D. Kansas.

April 18, 1996.

Lori R. Schultz, W. Dennis Cross, Morrison & Hecker L.L.P., Kansas City, MO Robert G. Wilson, Raphael Cotkin, Cotkin & Collins, Los Angeles, CA, Steven M. Garber, Cotkin, Collins and Franscell, Los Angeles, CA, Gerald I. Roth, Allentown, PA, for plaintiffs.

Linda J. Salfrank, John J. Kitchin, Swanson, Midgley, Gangwere, Kitchin & McLarney, LLC, Kansas City, MO, Craig T. Kenworthy, Swanson, Midgley, Gangwere, Kitchin & McLarney, LLC, Overland Park, KS, Alan I. Rothenberg, William J. Meeske, Latham & Watkins, Los Angeles, CA, William C. Barnard, Gayle A. Reindl, Sommer & Barnard, P.C., Indianapolis, IN, for defendant.

Memorandum and Order

VRATIL, District Judge:

This matter comes before the Court on plaintiffs' Motion for Interim Award of Attorneys' Fees and Expenses (Doc.

#164) filed November 13, 1995. Plaintiffs seek an interim award of attorneys' fees under § 16 of the Clayton Act, 15 U.S.C. § 26, which provides that "[i]n any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff." This Court entered summary judgment in plaintiffs' favor on the issue of liability on May 24, 1995.[1] It subsequently entered a permanent injunction (Doc. #214) in favor of plaintiffs Herrmann and Jarvis, enjoining the NCAA from reenacting or enforcing against them the compensation limits contained in the so-called restricted earnings coach rule. On January 17, 1996, the Court determined that plaintiffs were entitled to an interim fee award because they had "substantially prevailed" in this litigation.[2]

The NCAA objects to an interim fee award. Without waiving its objection to this and any future award of fees, however, it has worked with opposing counsel to agree on a reasonable amount of attorneys' fees and expenses. After several conferences, careful review and diligent negotiation, counsel have agreed on many issues and have stipulated that certain fees and expenses are reasonable and should be awarded at this time. A few objections, however, remain. The Court addresses each of these in turn.

A. Morrison & Hecker Legal Fees

The NCAA initially contested much of the fee request from plaintiffs' Kansas City counsel, Morrison & Hecker. The parties have reached a compromise, however, on the amount of interim fees and expenses which the Court should award at this time. The NCAA has agreed to pay and plaintiffs have agreed to accept $314,974.50 in attorneys' fees and $14,876.94 in

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[1] A written opinion setting forth the Court's reasoning followed on August 2, 1996 (Doc. #110).

[2] Plaintiffs' fee request, which is by definition an interim one, covers the period from the commencement of the litigation through October 31, 1995. That period was fixed only by the timing of plaintiffs' motion and defendant's objections, and it is not otherwise related to significant developments in the course of the litigation.

expenses for all charges incurred by Morrison & Hecker through October 31, 1995. In addition, they have agreed that $34,653.00 is a reasonable fee for the attendance of plaintiffs' counsel at court conferences and depositions.[3] Finally, the parties have agreed that Morrison & Hecker will guarantee repayment of any interim fees and expenses which it receives should the award eventually be overturned.

B. Cotkin & Collins Legal Fees

The NCAA objects to certain fees and expenses of Robert G. Wilson of the Cotkin & Collins law firm in Los Angeles, California. Specifically, it objects to travel charges between Los Angeles and Kansas City for depositions and court conferences, since competent counsel from Morrison & Hecker represented plaintiffs at all such proceedings.

Plaintiffs point out that Cotkin & Collins filed this case in the Central District of California and that it was transferred to this district for the convenience of parties and witnesses under 28 U.S.C. § 1404 on the NCAA's motion and over plaintiffs' objection. Plaintiffs did not retain Morrison & Hecker until the NCAA succeeded on its transfer motion. Since the transfer, however, plaintiffs have allowed most of the legal work to be done by Morrison & Hecker in Kansas City for reasons of efficiency and cost control. Plaintiffs argue that under these circumstances, Cotkin & Collins should not be required to abdicate its role in the action. Plaintiffs further argue that Mr. Wilson's attendance at significant hearings and other proceedings has been reasonable and necessary in light of the fact that he will be lead trial counsel with Dennis Cross of Morrison & Hecker.

District courts must examine fee petitions carefully and guard against potential unnecessary duplication of compensation for legal services:

> "[I]f three attorneys are present at a hearing when one would suffice, compensation should be denied for the excess time." Similarly, if the same task is performed by

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[3] This sum represents a blended rate of $370 per hour, and it will be divided among counsel as plaintiffs see fit.

> more than one lawyer, multiple compensation should be denied. The more lawyers representing a side of the litigation, the greater the likelihood will be for duplication of services.

Ramos v. Lamm, 713 F.2d 546, 554 (10th Cir. 1983) (internal citation omitted). Some of the NCAA objections relating to Mr. Wilson have been resolved by the parties' agreement to compensate plaintiffs' counsel at the aggregate blended rate of $370 per hour — to be divided among plaintiffs' counsel as they see fit — for attendance at court proceedings and depositions. Mr. Wilson still claims that he should be compensated for travel time and expenses in connection with those proceedings, however, and the NCAA (citing Ramos) objects.

The Court agrees with the NCAA that plaintiffs' local counsel, Morrison & Hecker, has represented plaintiffs more than adequately. The Court likewise believes that certain court proceedings and conferences have been overstaffed, both by plaintiffs' and defense counsel. However, the Court also accords considerable weight to the fact that Mr. Wilson plans to be lead trial counsel, along with Mr. Cross of Morrison & Hecker, and must therefore stay both informed about and involved in the progress of the case. Furthermore, the Court recognizes that, beyond merely staying informed, Mr. Wilson has taken an active role in some depositions and participated usefully in the hearings and conferences which he has attended. By the same token, he could have participated just as effectively by telephone in some instances.

Both parties' arguments are thus well taken on the issue of Mr. Wilson's request for travel expenses totalling $11,520 in fees and $3,492 in expenses. By way of resolving this dispute, the Court has determined that expenses should be awarded in connection with the first scheduling conference in Kansas City. Mr. Wilson's attendance at that conference was reasonable, necessary and in plaintiffs' best interest. The Court also finds that plaintiffs should be compensated for fees and expenses incurred in connection with Mr. Wilson's trip to Kansas City for the Schultz deposition. Apparently Mr. Wilson conducted

that deposition,[4] and the Court takes no issue with this distribution of responsibility among plaintiffs' counsel. The Court will deny plaintiffs' fee request, however, as it pertains to four other trips to Kansas City by Mr. Wilson. As to those conferences and court hearings, the Court finds that Mr. Wilson's personal attendance was not necessary; he could have participated just as competently by telephone.

As with the Morrison & Hecker award, the parties have agreed that Cotkin & Collins will guarantee repayment of the amount which it receives under this order in the event that it is eventually overturned.

C. Gerald I. Roth Legal Fees

Plaintiffs ask the Court to award them $80,717.16 for the fees and $7,973.66 for the expenses of Gerald I. Roth. The NCAA objects to a substantial portion of the claim for Mr. Roth. These objections are as follows:

1. Fees And Expenses Not Related To Issues On Which Plaintiffs Have Prevailed

The NCAA argues that plaintiffs should not be compensated for work on issues on which they have not yet prevailed. Such issues include class certification, damages, and work on the Schreiber case after the Court's summary judgment ruling in May 1995.[5] Defendant objects to specific billing entries by Mr. Roth from June through October 1995. Some of those entries relate clearly to class certification, damages and the Schreiber case. The Court cannot ascertain whether other billing entries relate to issues on which plaintiffs have prevailed.

At the outset, the Court notes that it does not agree with the NCAA's proposition that plaintiffs may only be compensated for work related to discrete issues on which they have formally prevailed:

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[4] See counsel's billing records and statements to the Court during the hearing on attorneys' fees.

[5] On February 13, 1996, the Court denied plaintiffs' request for a permanent injunction in Schreiber (Doc. #37).

> ... In [some] cases the plaintiff's claims for relief will involve a common core of facts or will be based on related legal theories.... Such a lawsuit cannot be viewed as a series of discrete claims. Instead the district court should focus on the significance of the overall relief obtained ....
>
> Where a plaintiff has obtained excellent results, his attorney should recover a fully compensatory fee.... the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit.... the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee....
>
> If, on the other hand, a plaintiff has achieved only partial or limited success, the product of hours reasonably expended on the litigation as a whole times a reasonable hourly rate may be an excessive amount. This will be true even where the plaintiff's claims were interrelated, nonfrivolous, and raised in good faith.

Hensley v. Eckerhart, 461 U.S. 424, 435-36 (1983). The claims raised in the cases before this Court involve a common core of facts and are based on related legal theories. Furthermore, plaintiffs have obtained excellent results for their clients. The Court is not bound to deny all claims for fees and expenses incurred in connection with claims or issues on which plaintiffs have not yet prevailed; rather, it is within the Court's discretion to decide whether any reduction is necessary or appropriate. *See id.* at 436-37; *Ramos*, 713 F.2d at 556.

Although the Court has discretion to award fees for Mr. Roth's work on issues on which plaintiffs have not prevailed, it will not do so at this time. This determination is expressly made without prejudice to a renewed request for fees at the conclusion of the case or, should circumstances change, in the

interim.[6] Accordingly, the Court reduces plaintiffs' fee request by $12,429.36 and plaintiffs' expense request by $1,819.60.[7]

2. Duplicative Fees And Expenses Where Competent Local Counsel Available

As with Mr. Wilson of Cotkin & Collins, the NCAA asserts that Mr. Roth should not be compensated for time spent in depositions where competent local counsel represented plaintiffs. The NCAA also objects to time and expenses for Mr. Roth's travel to Kansas City for court conferences and hearings.

Since the parties have agreed that plaintiffs' counsel will be compensated at a blended rate of $370 per hour for depositions and hearings and have settled on a dollar amount representing a reasonable fee for that time, the Court agrees that Mr. Roth should not be separately compensated for time spent attending depositions. The Court also agrees that expenses related to Mr. Roth's travel to Kansas City for court conferences and hearings should not be compensated, since he easily and effectively could have participated by telephone. Accordingly, the Court reduces plaintiffs' fee request by

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[6] Because the Court cannot ascertain the subject matter of some of the billing entries in question, it notes that plaintiffs have the burden of demonstrating that they are entitled to the fees requested. *See Hensley*, 461 U.S. at 437. The NCAA asserts that such entries are unrelated to the matters for which the Court is currently awarding fees, and plaintiffs have not offered any contrary evidence. Accordingly, for now, the Court groups those entries with the work done on class certification, damages and post-summary judgment Schreiber. Again, this determination is made without prejudice, and the Court will review such entries in connection with any renewed request for fees.

[7] The Court is confounded by Mr. Roth's request for reimbursement of "entertainment" expenses incurred in connection with his travel to Kansas City for depositions and status conferences with the Court. The Court cannot conceive of an occasion when such expenses would be appropriately shifted to an opposing party, and the Court is not likely to award such expenses in connection with any future request.

$3,740.00 and their corresponding expense request by $1,734.39.

3. Time Not Reasonably Spent Advancing Plaintiffs' Claims

The NCAA objects to many billing entries for Mr. Roth on the basis that they do not represent time reasonably spent advancing plaintiffs' claims in this litigation. As examples of non-compensable fees and expenses, the NCAA cites entries for fundraising, giving speeches to various coaches' organizations, updating individual head coaches and other non-parties on developments in the litigation and discussing with co-counsel media coverage of the case.

Mr. Roth notes that he is the one whom certain plaintiffs initially contacted; that he is the one who initially recognized the NCAA's conduct as an antitrust violation; and that he is the one who organized plaintiffs to pursue this lawsuit. Mr. Roth referred most of the substantive aspects of the cases to antitrust counsel, but he remains the contact person for certain members of the proposed plaintiff classes, keeping them organized and informed about the proceedings. In addition, Mr. Roth attempts to improve the salary situations of his clients by informing head coaches and other influential personnel at NCAA member institutions of these proceedings and related matters.

While the latter objective may be commendable and worthy of Mr. Roth's time and energy, it is not legal work related to the antitrust claims in this lawsuit; rather, it is the work of an agent or publicist.[8] Fees for such services are not appropriately shifted, however, to the NCAA. The fees and expenses incurred in making contacts with head coaches and other non-parties to this litigation were aimed primarily at "updating" or lobbying, and they are therefore denied. Similarly, the fees and expenses incurred in making contacts with the media, discussing media coverage and drafting correspondence relating to media coverage are denied because

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[8] From the clients' perspective, Mr. Roth's unflagging advocacy of their salary interests may ultimately prove to be the most financially valuable work by any of the lawyers in this case.

they were not reasonably expended in furtherance of the issues in this litigation. Finally, while the Court recognizes that fundraising is a necessary function of class action litigation, it does not believe that Mr. Roth's fundraising activities and speeches to coaches' organizations are appropriately shifted to the NCAA. Accordingly, plaintiffs' request for those fees and the expenses incurred in connection with them is denied.

Organizing clients and updating them on the status of their lawsuit are, on the other hand, essential and integral parts of the work of plaintiffs' counsel. If Mr. Roth is best situated among plaintiffs' legal counsel to inform plaintiffs of the status of their case and perform other organizational functions in an efficient and effective manner, then he should do so and be compensated for his time and expenses. In awarding those fees and expenses, however, the Court may not simply award the amounts reported; it must determine that they were reasonably expended. *See Ramos*, 713 F.2d at 553. After reviewing Mr. Roth's billing records, the Court is not convinced that his services have been uniformly rendered in a reasonably efficient and effective manner. For example, while a few billing entries reflect mass mailings to update coaches on developments in the litigation,[9] many other entries that indicate that Mr. Roth updated coaches individually by telephone. Such telephone calls generally lasted between ten and thirty minutes. The Court views the former method as vastly preferable and the latter as, in many instances, inefficient and wasteful. Accordingly, the Court has determined that Mr. Roth should be compensated for some but not all of the fees incurred in organizing and updating plaintiffs and members of the proposed plaintiff classes. In this category, defendant requests that Mr. Roth's award be reduced by $26,600.90. In order to compensate Mr. Roth adequately for hours reasonably expended in this litigation on the tasks which he has undertaken, however, the Court finds that the proper reduction is $19,000.00.

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[9] For example, on May 25, 1995, Mr. Roth billed one hour for drafting "[l]etters to Coaches (151) regarding 'Good News' — NCAA rescinding compensation provision."

With the possible exception of postage, the Court agrees with the NCAA that certain expenses were not reasonably expended in advancing plaintiffs' claims in this litigation. Such expenses correspond with the above-discussed fees disallowed by the Court and are likewise disallowed. Mr. Roth claims that he spent $602.90 on postage. As noted above, the Court believes that expenses for communicating with plaintiffs and members of the proposed classes should be allowed. It does not believe that Mr. Roth should be reimbursed for expenses in communicating with head coaches, members of the media or other non-parties to these lawsuits. On the record presented, the Court cannot allocate postage expenses between permissible and impermissible categories without engaging in pure speculation. Plaintiffs' request for reimbursement of postage expenses is therefore denied without prejudice. Mr. Roth's expenses are therefore reduced by $2,476.01.

4. Expenses Associated With Plaintiffs' Depositions

The parties have agreed to share equally the costs of air travel, hotels and meals associated with plaintiffs' depositions, yet Mr. Roth claims that he should be reimbursed $171.49 for meals which he purchased for plaintiffs when they were attending their own depositions. The NCAA is responsible for only half of that amount, pursuant to the parties' agreement. Mr. Roth's expenses are therefore reduced by $85.75.

5. Mr. Roth's Billing Rate

The NCAA objects to Mr. Roth's hourly rate, which he lists as $220 per hour. Mr. Cross charges that same rate, and it is apparently the going rate in the Kansas City for attorneys with similar experience and expertise in antitrust law. The NCAA argues that Mr. Roth's work in explaining the litigation to plaintiffs does not have the same value as Mr. Cross's efforts in achieving those results. The Court doubts that defense counsel charge the NCAA less for time spent informing the NCAA of the status of the case than for substantive antitrust work, but the Court agrees that Mr. Roth's rate should be reduced because of his role in the litigation. The Tenth Circuit has instructed that

> [t]he hourly rate [to be awarded under a fee-shifting statute] should be based on the lawyers' skill and experience in [the particular type of] litigation. Lawyers working outside their fields of expertise may deserve an hourly fee lower than their normal billing rate because of their lack of experience in the ... field.

Ramos, 713 F.2d at 555.

Mr. Roth points out that $220 is his usual billing rate and that he has been practicing law for 39 years, but he readily admits that he has no experience or expertise in antitrust law. Therefore, it appears that Mr. Roth's situation is exactly that which the Tenth Circuit addressed in Ramos. The NCAA should not be required to pay an experienced attorney's rate for work done by someone who has no experience in that particular type of litigation. The Court adopts what it believes is a reasonable suggestion from the NCAA — that Mr. Roth be compensated at the same rate as Lori Schultz, the Morrison & Hecker partner who assists Mr. Cross in representing plaintiffs. This reduction is not intended to reflect poorly on the quality of Mr. Roth's representation, but only to reflect accurately the substance and type of work that he is doing in an area outside his field of expertise.

In conclusion, the Court has determined that plaintiffs be awarded $31,055.32 in interim fees for Mr. Roth's legal services and $1,857.91 in corresponding expenses. The Court is uninformed of any agreement that Mr. Roth will guarantee repayment of this award in the event that it is ultimately overturned. If counsel are unable to reach such an agreement and if the NCAA believes that security for this interim award is required, it shall file an appropriate motion on or before April 24, 1996.

IT IS THEREFORE ORDERED that on or before April 29, 1996, the NCAA pay interim fees and expenses, as set forth in this order, in the following amounts:

To Morrison & Hecker, the sum of $14,876.94 in expenses and $314,974.50 in legal fees; and

To Gerald I. Roth, the sum of $1,857.91 in expenses and $31,055.32 in legal fees.

IT IS FURTHER ORDERED, because the Court cannot ascertain from the record the exact amount which Cotkin & Collins is entitled to be paid in accordance with the findings in this order, that the parties consult with each other to determine the proper amount. If counsel are unable to reach agreement, the parties shall file appropriate briefs on the matter, setting forth their dispute, on or before April 24, 1996.

IT IS FURTHER ORDERED that on or before April 29, 1996, the NCAA pay interim legal fees, in the amount of $34,653.00, representing the blended award for plaintiffs' counsel's attendance at court conferences and depositions, as set forth in this order. If counsel are unable to reach agreement as to how such award should be paid or guaranteed, the parties shall file appropriate briefs on the matter, setting forth their dispute, on or before April 24, 1996.

IT IS FURTHER ORDERED that the foregoing payments to Morrison & Hecker and Cotkin & Collins are hereby secured by their respective guarantees of repayment of the amounts paid to each of them, in the event that the awards are later overturned in whole or in part, which guarantees the NCAA accepts in lieu of any additional or further security or bond.

APPENDIX G

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, Individually, and on behalf of all other similarly situated, Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

No. 94-2053-KHV.
United States District Court, D. Kansas.
Jan. 5, 1996.

Lori R. Schultz, W. Dennis Cross, Morrison & Hecker L.L.P., Kansas City, MO, Robert G. Wilson, Raphael Cotkin, Cotkin & Collins, Los Angeles, CA, Steven M.Garber, Cotkin, Collins and Franscell, Los Angeles, CA, Gerald I. Roth,Allentown, PA, for plaintiffs.

Linda J. Salfrank, John J. Kitchin, Swanson, Midgley, Gangwere, Kitchin & McLarney, L.L.C., Kansas City, MO, Craig T. Kenworthy, Swanson, Midgley, Gangwere, Kitchin & McLarney, L.L.C., Overland Park, KS, Alan I. Rothenberg, William J. Meeske, Latham & Watkins, Los Angeles, CA, William C. Barnard, Gayle A. Reindl, Sommer & Barnard, P.C., Indianapolis, IN, for defendant.

MEMORANDUM AND ORDER

VRATIL, District Judge.

This matter comes before the Court on plaintiffs' Motion for Permanent Injunction and Interim Award of Attorneys' Fees and Expenses (Doc. #105).[1] In their motion, plaintiffs seek an

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[1] During a telephone conference with the parties, the Court agreed to stay its consideration of plaintiffs' motion for an interim award of attorneys' fees, while the parties further briefed the appropriateness of such an award. If the Court determines an award of attorneys' fees is warranted, it will then be necessary for the parties to comply with the requirements of D. Kan. Rule 54.2 and Fed. R. Civ. P. 54(d)(2) regarding such awards.

order permanently enjoining defendant and its members from agreeing among themselves to fix or limit the compensation of any coaches or any category of coaches and from attempting to enforce any such agreement. As discussed below, the Court has determined that plaintiffs are entitled to some injunctive relief, though not as broad as they have requested.

Background

Plaintiffs initiated this suit, alleging that the Division I members of the National Collegiate Athletic Association ("NCAA"), in violation of the Sherman Antitrust Act, 15 U.S.C. § 1 (the "Sherman Act"), conspired to limit the maximum compensation they would pay to one category of basketball coaches, the "restricted earnings coaches." Defendant argued that the agreement at issue — NCAA Bylaw 11.02.3, adopted in January 1991 (the "restricted earnings coach rule") — was not an unreasonable restraint of trade. Finding defendant's reasoning unpersuasive, this Court granted summary judgment on May 24, 1995, in favor of plaintiffs on the issue of liability (Doc. #98), ruling that the restricted earnings coach rule violates Section 1 of the Sherman Act.[2] At the request of the parties and with their agreement, the Court had bifurcated the proceedings so that its decision on liability would precede any evidence on damages. The Court also acquiesced in the parties' request that it consider the issue of class certification subsequent to making its determination on the issue of liability. The issues of class certification and damages are thus still pending before this Court, and a trial on damages is currently set for June 4, 1996.

On May 25, 1995, in response to the Court's summary judgment order, which held that the restricted earnings coach rule violated the Sherman Act, the Administrative Committee of the NCAA met by telephone and voted to rescind the compensation limitations of the rule, as embodied in Bylaws 11.02.3 and 11.3.4. The NCAA informed its members of its decision the same day and advised them that "effective immediately, there are no limitations on the amount of

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[2] A written decision followed on August 2, 1995 (Doc. #110).

compensation that may be paid to a restricted-earnings coach ...."[3] Since then, counsel for the NCAA has advised the Court that the Administrative Committee's May 25 action is not final; rather, such action must be submitted to the NCAA members for ratification at their annual convention in January 1996. In addition, other legislation proposed for consideration at the convention would reinstate certain compensation limitations of the rescinded restricted earnings coach rule under different titles. The NCAA Council, at its August 1995 meeting, requested that the sponsors of these proposals withdraw them; however, the sponsors have declined to do so.

Discussion

Section 16 of the Clayton Act entitles private antitrust plaintiffs to injunctive relief from the threat of injury resulting from violation of the antitrust laws. *Credit Bureau Reports, Inc. v. Retail Credit Co.*, 476 F.2d 989, 992 (5th Cir. 1973). To obtain such relief, the moving party must prove either (1) that the alleged offender has already violated the antitrust laws or (2) that such a violation is impending and that, because of this violation, that party is threatened with antitrust injury. *See id.* In seeking injunctive relief, plaintiffs carry the burden of proving that such relief is necessary. *See Wilk v. American Medical Ass'n*, 895 F.2d 352, 367 (7th Cir. 1990). If plaintiffs do so, the Court may fashion its relief to fit the exigencies of the case before it. *See, e.g., International Salt Co. v. United States*, 332 U.S. 392, 400-401 (1947). When an antitrust violation has already been identified, a district court has both the duty and the authority to fashion relief that terminates the illegal acts, that ensures that they do not recur and that eliminates their consequences. *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 697 (1978); *see also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 132 (1969) (federal court "has broad power to restrain acts

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[3] Despite plaintiffs' repeated assertions that the NCAA has been unapologetic and recalcitrant in taking remedial action based on the Court's order, the Court finds no fault here with the NCAA's action and views the NCAA's prompt notice to its members as fully adequate to convey the importance of rescinding the compensation limits.

which are of the same type or class as unlawful acts which the court has found to have been committed or whose commission in the future unless enjoined, may fairly be anticipated from the defendant's conduct in the past"). However, the scope of such injunctive relief should be narrowly tailored and should not exceed the established violation. *See Hayes v. North State Law Enforcement Officers Ass'n*, 10 F.3d 207, 217 (4th Cir. 1993). A court should award a private antitrust plaintiff injunctive relief "only to the extent necessary to protect it from future damage." *Wilk*, 895 F.2d at 370.

The Court has determined that the restricted earnings coach rule violates the Sherman Act. Upon finding such a violation, the Court is "empowered to fashion appropriate restraints on the [defendant's] future activities both to avoid a recurrence of the violation and to eliminate its consequences." National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 697 (1978).

In resisting plaintiffs' motion for injunctive relief, defendant continues to take issue with the Court's finding in its summary judgment order that plaintiffs suffered antitrust injury. Although its reasoning is set forth more fully in its summary judgment order, the Court reiterates here its finding that plaintiffs have proven the requisite elements to demonstrate that they have suffered antitrust injury and to proceed to consideration of their damages: plaintiffs' burden of proving the fact of injury under the Clayton Act is "satisfied by its proof of some damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage." *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981), quoting *Zenith Radio*, 395 U.S. at 114. Furthermore, courts may conclude "from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts ha[ve] caused damage to the plaintiffs." *World of Sleep, Inc. v. La-Z-Boy Chair Co.*, 756 F.2d 1467, 1478 (10th Cir. 1985), quoting *Zenith Radio*, 395 U.S. at 123-24.

The uncontroverted evidence in this case has shown that the value of the services of at least some restricted earnings coaches, including plaintiffs, has declined as a direct result of the NCAA's cap on the amount their employers are allowed to pay them. No evidence in the record tends to demonstrate that any other cause is responsible for this decline. In fact, the NCAA's purpose in enacting the restricted earnings coach rule was to cut costs, and the record reflects that the rule has achieved that goal. Plaintiffs whose opportunities in the employment market have been impaired by an anticompetitive agreement directed at them as a particular segment of employees have suffered an antitrust injury under the governing standard. *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995).

Plaintiffs have shown that the NCAA has violated the antitrust laws; they are therefore entitled to injunctive relief under § 16 of the Clayton Act to prevent any threatened recurrence of the same or similar violation. *See Credit Bureau Reports*, 476 F.2d at 992 (5th Cir. 1973). Even taking defendant's view for the moment, and assuming that plaintiffs have suffered no injury, injunctive relief would still be appropriate:

> ... § 16 of the Clayton Act, ... which was enacted by the Congress to make available equitable remedies previously denied private parties, invokes traditional principles of equity and authorizes injunctive relief upon the demonstration of "threatened" injury. That remedy is characteristically available even though the plaintiff has not yet suffered actual injury ... ; he need only demonstrate a significant threat of injury from an impending violation of the antitrust laws or from a contemporary violation likely to continue or recur.

Zenith Radio, 395 U.S. at 130 (internal citations omitted). To obtain injunctive relief under § 16 of the Clayton Act, a private antitrust plaintiff must show "threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.'" *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 113

(1986), quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

There is little doubt that restricted earnings coaches whose compensation is directly impacted by the rule are threatened with continuing loss or damage if the rule's provisions are reenacted. Regardless of the amount they would be able to negotiate in a salary contract with their current employers in an unrestrained market, they will be unable to earn more than $16,000 per year under the rule. Three of the named plaintiffs — Law, Rieb, and Greer — are no longer employed as restricted earnings basketball coaches. Therefore, while they may have sustained injury in the past as a result of the restricted earnings coach rule's compensation limitations, they have made no showing that they are threatened currently with antitrust injury should the rule's provisions be reenacted. It appears from the record, however, that plaintiffs Herrmann and Jarvis, on the other hand, are currently employed as restricted earnings coaches. Both Herrmann and Jarvis have either held or been offered coaching positions at Division I schools at a salary higher than $16,000. Therefore, the Court finds that plaintiffs Herrmann and Jarvis are immediately threatened with harm to their business by the looming prospect that the rule, or similar provisions, might be reenacted.

To warrant injunctive relief in their favor, plaintiffs must also show that they are threatened immediately with irreparable harm:

> The equitable remedy is unavailable absent a showing of irreparable injury, a requirement that cannot be met where there is no showing of any real or immediate threat that the plaintiff will be wronged again — a "likelihood of substantial and immediate irreparable injury."

City of Los Angeles v. Lyons, 461 U.S. 95, 111 (1983) (citation omitted). The threat of injury must be real, not merely "conjectural" or "hypothetical." *Id.* at 102.

Defendant maintains that any threat of injury even to these two plaintiffs is based on speculation and conjecture and is therefore not immediate enough to warrant injunctive action. Defendant argues that the fact that NCAA members might not

approve rescission of the restricted earnings coach rule or might vote to enact other proposed legislation limiting the coaches' compensation does not present a real and immediate threat of injury. Based on the past conduct of the NCAA and its membership, however, both before and during this litigation, the Court must respectfully disagree and find that plaintiffs Herrmann and Jarvis are faced with a real and immediate threat of antitrust injury as the NCAA and its members gather to convene their annual convention this month.

Plaintiffs here ask for classwide relief — that the NCAA and its members be enjoined from enforcing any of the compensation limitations of the restricted earnings coach rule against any of their employees. However, the Court has not yet certified this case as a class action. For now, for the Court to grant them injunctive relief, plaintiffs must demonstrate that they themselves are threatened with antitrust injury. *See, e.g., Everhart v. Bowen*, 853 F.2d 1532, 1538-39 (10th Cir. 1988) (where no class has been certified, district court may not treat a claim for an injunction as though it were a class action), rev'd on other grounds, 494 U.S. 83 (1990); *Zepeda v. United States INS*, 753 F.2d 719, 727 (9th Cir. 1983) (injunction must be limited to apply only to individual plaintiffs unless class of plaintiffs is certified). Therefore, the Court will grant injunctive relief only to plaintiffs Herrmann and Jarvis.[4]

Defendant argues finally that injunctive relief is inappropriate because plaintiffs have an adequate remedy at law. Generally, parties whose injuries can be rectified by an award of monetary damages have an adequate remedy at law, and courts are reluctant to grant them equitable relief. *See, e.g., Lewis v. S.S. Baune*, 534 F.2d 1115, 1124 (5th Cir. 1976); *Jade Aircraft Sales, Inc. v. City of Bridgeport*, 849 F. Supp. 10, 12 (D. Conn. 1994); 11ACharles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2944 at 83 (1995). Defendant notes that monetary damages are the "quintessential"

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[4] If the Court later determines that a class should be certified, or if the circumstances of this case should otherwise change, the parties are, of course, free to move the Court to amend, expand or vacate its injunction.

form of remedy in cases of price-fixing and asserts that if plaintiffs Herrmann and Jarvis are actually injured by any price-fixing agreement that might arise at the NCAA's annual convention, monetary damages would adequately redress their injury later. However,

> The legal remedy may be deemed inadequate if any one of a number of factors is present. Accordingly, if plaintiff ... demonstrates that effective legal relief can be secured only by a multiplicity of actions, as, for example, when the injury is of a continuing nature, so that plaintiff would be required to pursue damages each time he was injured, equitable relief will be deemed appropriate.

11A Charles A. Wright et al., FEDERAL PRACTICE AND PROCEDURE § 2944 at 89-90 (1995).

The record shows that coaches generally negotiate their contracts on a yearly basis. The injury inflicted by the restricted earnings salary cap would be a continuing one, which would prevent the coaches from negotiating their salaries each year in a free market for coaching services. Furthermore, based on the record, the Court is convinced that plaintiffs are also threatened with other, less monetarily quantifiable, damages as a result of these compensation limitations; for example, plaintiffs might very likely make irreversible, career-impacting decisions regarding which job opportunities to pursue, accept or turn down based on the salary they are able to negotiate for their coaching services. Because of these threatened harms, the Court finds that the legal remedy of monetary damages is inadequate in this instance and that injunctive relief is appropriate.

IT IS THEREFORE ORDERED that the NCAA, its officers, agents, servants, employees, attorneys, and any person in active concert or participation with them who receive actual notice of this order by personal service or otherwise, be and hereby are permanently enjoined from reenacting the compensation limitations embodied in NCAA Bylaws 11.02.3 and 11.3.4 and enforcing or attempting to enforce any such limitation against Peter Herrmann or Michael Jarvis, Jr.

APPENDIX H

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, Individually and on Behalf of All Other Similarly Situated, Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant.

No. 94-2053-KHV.

United States District Court, D. Kansas.

Aug. 2, 1995.

Lori R. Schultz, W. Dennis Cross, Morrison & Hecker, Kansas City, MO, Robert G. Wilson, Raphael Cotkin, Cotkin & Collins, Los Angeles, CA, Steven M. Garber, Cotkin, Collins and Franscell, Los Angeles, CA, Gerald I. Roth, Allentown, PA, for plaintiffs Norman Law, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., Charles M. Rieb.

Linda J. Salfrank, John J. Kitchin, Swanson, Midgley, Gangwere, Kitchin & McLarney, LLC, Kansas City, MO, Craig T. Kenworthy, Swanson, Midgley, Gangwere, Kitchin & McLarney, LLC, Overland Park, KS, Alan I. Rothenberg, William J. Meeske, Latham & Watkins, Los Angeles, CA, William C. Barnard, Gayle A. Reindl, Sommer & Barnard, P.C., Indianapolis, IN, for defendant National Collegiate Athletic Ass'n.

Memorandum and Order [1]

VRATIL, District Judge.

This matter comes before the Court on Plaintiffs' Motion for Summary Judgment on the Issue of Liability (Doc. # 73). Plaintiffs in this suit allege that the Division I members of the

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[1] This amended Memorandum and Order supersedes the Court's previously filed Memorandum and Order, dated July 25, 1995, on the same matter.

National Collegiate Athletic Association ("NCAA"), in violation of the Sherman Antitrust Act, 15 U.S.C. § 1 (the "Sherman Act"), have conspired to limit the maximum compensation they will pay to one category of basketball coaches, the "restricted earnings coaches." Defendant argues that the agreement at issue here — NCAA Bylaw 11.02.3, adopted in January 1991 — does not restrict plaintiffs' potential compensation; defendant further argues that in any case, Bylaw 11.02.3 does not violate the Sherman Act because the restriction is justified under the circumstances presented. Therefore, defendant maintains that the agreement embodied in Bylaw 11.02.3 is not an unreasonable restraint of trade. Plaintiffs move for summary judgment, asserting that there is no dispute about the existence or the terms of the restriction, that the restriction on its face is an impermissible restraint of trade, and that the NCAA can thus demonstrate no set of facts that would allow the restriction to pass muster under the Sherman Act.[2]

Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court considers all evidence and reasonable inferences therefrom in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). The nonmoving party, however, "may not rest on its pleadings but must set forth specific facts showing that there is a genuine issue for trial as to those dispositive

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[2] Coaches in two other lawsuits have brought similar antitrust challenges to Bylaw 11.02.3. *See Hall* v. *NCAA*, Case No. 94-2392, filed September 30, 1994; *Schreiber, et al.* v. *NCAA*, Case No. 95-2026, filed January 13, 1995. Plaintiffs as well as the NCAA in those cases have agreed to be bound by this Court's ruling on the pending summary judgment motions with respect to the issue of liability. *See Hall*, Stipulation and Order (Doc. # 26), filed December 19, 1994; *Schreiber*, Stipulation and Order (Doc. # 8), filed February 6, 1995.

matters for which it carries the burden of proof." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990). Thus, summary judgment may be entered "against a party who fails to make a sufficient showing to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986).

Factual disputes about immaterial matters are irrelevant to a summary judgment determination. *Frank v. U.S. West, Inc.*, 3 F.3d 1357, 1361 (10th Cir.1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986)). If, given the operative facts of the case, the nonmoving party fails to set forth specific facts showing that there is a genuine issue for trial and the moving party is entitled to judgment as a matter of law, then summary judgment is appropriate. *Devery Implement Co. v. J.I. Case Co.*, 944 F.2d 724, 726-27 (10th Cir.1991) (citing *Anderson*, 477 U.S. at 256-57, 106 S.Ct. at 2514). While it is not the trial judge's function to weigh the evidence and determine the truth of the matter at the summary judgment stage, summary judgment in favor of the moving party is nonetheless proper if the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. *Concrete Works of Colorado, Inc. v. City and County of Denver*, 36 F.3d 1513, 1518 (10th Cir.1994), *cert. denied*, — U.S. ——, 115 S.Ct. 1315, 131 L.Ed.2d 196 (1995).

Having examined the record in light of the relevant law, the Court finds that plaintiffs' motion should be sustained for the reasons stated below.

I. Background [3]

The NCAA is an association of over 800 colleges and universities engaged in intercollegiate athletic competition. Its members are divided into Division I, Division II and Division

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[3] The following facts are either uncontroverted or, where controverted, construed in the light most favorable to the nonmoving party. Immaterial facts and factual averments not properly supported by the record are omitted.

III schools, depending on the number of sports offered at the school, its philosophy towards athletics and athletic scholarships, the number of participants in its athletic programs, the level of attendance at athletic events, the size of the school's facilities and a number of other factors. NCAA Division I basketball programs are generally of a higher stature and have more visibility than Division II and III basketball programs. The NCAA has approximately 300 Division I schools. Each Division I member of the NCAA hires and employs its own basketball coaches.

In 1989, the NCAA established a Cost Reduction Committee, charged with the task of formulating recommendations to NCAA members for reducing costs in intercollegiate athletics without compromising access of student-athletes to higher education or disturbing the competitive balance of the NCAA. At that time, many NCAA member institutions perceived difficulties in meeting costs associated with the maintenance of intercollegiate athletic programs. For example, many NCAA institutions were reducing the number of sports they offered as a means of controlling the overall cost of their athletic programs. In addition, because of troubles in managing their overall athletic budgets, some NCAA schools found themselves in noncompliance with Title IX requirements regarding women's athletics. Financial problems notwithstanding, many NCAA institutions meanwhile felt pressure to maintain, or even increase, spending on recruiting talented players and coaches and on other aspects of their sports programs in order to stay athletically competitive with rival schools. In defendant's words, they experienced pressure to "keep up with the Joneses." The NCAA formed the Cost Reduction Committee in response to what some viewed as a catastrophic cost spiral which, if not controlled, would eventually cause the complete demise of intercollegiate athletics.

The Committee included financial aid personnel and intercollegiate athletic administrators, college presidents, a university chancellor and university faculty members. Eugene Corrigan, Commissioner of the Atlantic Coast Conference, chaired the Cost Reduction Committee. In his initial letter to

committee members, Corrigan thanked them for joining "this gigantic attempt to save intercollegiate athletics from itself." Corrigan later explained the phrase "to save intercollegiate athletics from itself" to mean that a collaborative effort among NCAA members was required to maintain a level playing field because unilateral cost reduction efforts by individual members were ineffectual.[4]

Every four years, the NCAA commissions the "Raiborn Report," an analysis of financial trends and relationships in intercollegiate athletics prepared by Mitchell H. Raiborn, a professor of accounting at Bradley University. The Cost Reduction Committee used the 1986 Raiborn Report (covering

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[4] Another member of the Cost Reduction Committee explained this point further. Donna Lopiano testified that if one educational institution cuts costs, and its athletic competitor does not make the same reductions, the latter will be more competitive on the field than the former. To illustrate, if institution "A" unilaterally cuts its number of scholarships from 85 (the number permitted in Division I-A) to 50, institution "A" necessarily becomes less competitive than institutions that use 85 scholarships to recruit their teams. Similarly, if NCAA legislation allows 10 football coaches, and institution "A" unilaterally reduces that number to 2 football coaches, then the schools with 10 coaches will have a valuable recruiting tool, in that they will be able to offer better coach-student ratios and guarantee more individualized attention for the student-athlete's experience. Ms. Lopiano further testified that when an institution loses athletic contests due to an "unlevel playing field," it suffers diminished revenues because it loses spectators, has disconcerted alumni and experiences other disadvantageous effects. The concept of a "level playing field" has frequently been referred to in this litigation as "competitive equity."

The NCAA's constitution describes the concept of competitive equity in this way:

> *The Principle of Competitive Equity.* The structure and programs of the Association and the activities of its members shall promote opportunity for equity in competition to assure that individual student-athletes and institutions will not be prevented unfairly from achieving the benefits inherent in participation in intercollegiate athletics.

NCAA 1994-95 Manual, Const. 2.9.

the period 1981-85) to map out its task of reducing costs in intercollegiate athletics. According to the 1986 Raiborn Report, personnel, scholarships and travel comprised the largest items in the athletic budgets of member institutions, and the majority of institutions across the country were running deficit football and basketball programs. The 1986 Raiborn Report found that in 1985, forty-two percent of NCAA Division I schools reported deficits averaging $824,000 in their overall athletic program budgets. Regarding overall athletic department expenses, the report noted:

> The percentage increase in average expenses between 1978 and 1985 exceeds 100 percent for all institutions except [member institutions in Division III that do not have football programs].... Average 1985 [Division I] expenses of $4,609,000 are 286 percent of the 1973 average, which indicates a 186 percent increase since 1973. The long-run trend analysis ... indicates a significant percentage increase in the average expenses of each responding group.

According to the 1986 Raiborn Report, fifty-one percent of the responding Division I institutions incurred expenses exceeding revenues in their basketball programs in 1985, sustaining an average deficit of $145,000.

Early in its discussions, the Cost Reduction Committee identified five areas in which cost reduction could be achieved: financial aid, recruiting, staffing policies, competitive policies and ancillary support services. The Committee identified personnel as the largest expense in intercollegiate athletic programs and determined that costs could be reduced by curtailing football and basketball staffs and by limiting personnel in other sports as well. The Cost Reduction Committee directed its subcommittee on personnel limitations to consider, in particular, the coaching categories in football and basketball for graduate assistants, volunteers and part-time coaches.

As a result of its deliberations, the Cost Reduction Committee proposed legislation (collectively, the "Restricted Earnings Coach Rule"), which limited the number of coaches in all Division I sports and required institutions to designate one of their coaches in every sport other than football a

"restricted earnings coach."[5] In Division I men's basketball, the limit set for coaching staffs was three head or assistant coaches and one restricted earnings coach. The Restricted Earnings Coach Rule also required that restricted earnings coaches' compensation be limited to $12,000 during the academic year and $4,000 during the summer months. The Cost Reduction Committee determined that these figures approximated the cost of out-of-state tuition at public institutions and average tuition at private institutions, and was thus roughly equivalent to the salaries previously paid to graduate assistant coaches.[6] Under the rule, restricted earnings coaches may receive additional compensation for performing duties for another department of the institution during either the summer or the academic year, provided that (1) such compensation is commensurate with that received by others performing the same or similar assignments, (2) the ratio of compensation received for coaching duties and any other duties is directly proportionate to the amount of time devoted to the two areas of assignment, and (3) the individual is qualified for

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[5] NCAA Bylaw 11.02.3 defines the position of "restricted-earnings coach"; Bylaw 11.3.4 details other aspects of compensation, benefits and expenses for restricted earnings coaches; and Bylaw 11.7.4 sets forth the number of coaches each institution may employ for each sport.

[6] Prior to the enactment of the Restricted Earnings Coach Rule, NCAA rules provided that NCAA Division I basketball programs could employ one head coach and two full-time assistant coaches, and could fill two additional positions with part-time assistants, graduate assistants or volunteer coaches. Volunteer coaches were not entitled to receive any compensation during the academic year or the summer months; graduate assistant coaches were allowed to receive the full value of their educational experiences, based upon their status as in-state or out-of-state residents (a "grant-in-aid"); and part-time coaches were limited in compensation to the value of a grant-in-aid based upon non-resident status. NCAA member institutions that did not have graduate schools obviously could not fill the positions designated as graduate assistant coaches. The "restricted-earnings coach" position of Bylaw 11.02.3 was intended to collapse the categories of part-time assistants, graduate assistants and volunteer coaches into a single category.

and performing the duties outside the athletic department for which the individual is compensated. The Division I members of the NCAA voted in January 1991 to adopt the Restricted Earnings Coach Rule effective August 1, 1992.[7]

The limitations set forth in the Restricted Earnings Coach Rule reflect an effort by the Cost Reduction Committee, in its own words, to "establish a 'restricted earnings' category that will encourage the development of new coaches while more effectively limiting compensation to such coaches."[8] In addition, the chairman of the Committee told NCAA members in January 1990 that the goal of the Cost Reduction Committee was to "cut costs and save money" and that "the basic premise

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[7] NCAA members also enacted a "grandfather clause" pertaining to prior contractual obligations between member institutions and their personnel. Bylaw 11.2.3 provides that limitations on the number of coaches do not apply in circumstances where academic tenure, enforceable written contracts or formal written security-of-employment commitments make it impossible to comply with such limits. Such exceptions continue until the end of the contract period or until normal attrition — through death, retirement or voluntary resignation — makes it possible for the institution to comply with the limitations.

[8] The fuller rationale offered by the Committee for the proposed rule is as follows: ...

> The largest expense item in the athletics budget is personnel. Currently, only football and basketball have limits on the number of coaches who may be employed, and the existing categorical designation of part-time graduate student and volunteer coach have not been effective in reducing the number of full-time paid employees associated with the sport. In addition, the committee recognizes the recent proliferation of part-time personnel associated with many Division I sports. Proposed limitations reflect an effort to: (1) reduce the number of coaches associated with each sport by at least one full-time equivalent position; (2) establish an "unrestricted" head or assistant coach category that will accommodate any type of volunteer, paid, full-time or part-time coach, and (3) establish a "restricted-earnings" category that will encourage the development of new coaches while more effectively limiting compensation to such coaches.

that we need to create legislation to save us from ourselves has overwhelming support."

The Restricted Earnings Coach Rule does not attempt to limit what member institutions spend on their basketball programs, except as to salaries of restricted earnings coaches. It does not prevent member institutions from increasing expenditures on other aspects of their athletic programs as they implement the cost reduction measures involving restricted earnings coaches. The Cost Reduction Committee did not recommend and the NCAA did not adopt any measure limiting salaries or compensation paid to other employees in athletic departments, such as head or assistant coaches.

The Restricted Earnings Coach Rule is binding on all Division I members and all restricted earnings coaches. All plaintiffs are or were employed as restricted earnings basketball coaches at NCAA Division I institutions, and their compensation as restricted earnings coaches thus is subject to and governed by the Restricted Earnings Coach Rule.

II. Discussion

A. Material Facts Undisputed

Although in resisting this motion for summary judgment the NCAA purports to controvert several of the facts set forth by plaintiffs, most of the NCAA's disputes are either about immaterial facts or merely about the implications of certain facts and their legal significance. A close review of the parties' contentions reveals that the material facts are undisputed, and the real dispute lies not in what the facts are but in how the law should be applied to those facts.

The Restricted Earnings Coach Rule speaks for itself. The parties do not dispute what it says on its face or what it requires of member institutions and restricted earnings coaches in practice. The parties do not genuinely dispute that plaintiffs fall within the category of those whom the rule was intended to affect. Likewise, the parties do not dispute that the NCAA's stated objectives in enacting the Restricted Earnings Coach Rule were to reduce costs, maintain competitive equity among member institutions and retain an entry-level position for coaches wishing to gain experience at the Division I level.

Finally, the record reveals no real dispute (despite the NCAA's halfhearted attempt to create one) that Division I members of the NCAA, in the absence of rules curtailing such competition, compete with each other for the services of basketball coaches — otherwise NCAA members would have perceived no need for a rule such as the Restricted Earnings Coach Rule, and the NCAA's repeated assertion that the rule is necessary to maintain competitive equity and to prevent schools from escalating personnel expenditures in order to "keep up with the Joneses" would be senseless. Finding no material factual dispute on this record, the Court moves directly to its analysis of the parties' legal arguments.

B. The Per Se Rule

Section 1 of the Sherman Antitrust Act provides that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...." 15 U.S.C. § 1. Recognizing that under this definition, almost any commercial contract could be held in violation of the law, the Supreme Court has held that only "unreasonable" restraints are unlawful. *See, e.g., Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 60, 31 S.Ct. 502, 515-16, 55 L.Ed. 619 (1911).

Some activities, however, are condemned as a matter of law, without inquiry into their reasonableness, under an "illegal *per se*" approach because the probability that such activities are anticompetitive is so high. *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 100, 104 S.Ct. 2948, 2959, 82 L.Ed.2d 70 (1984) ("*Board of Regents*"). This *per se* approach is used in situations where "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1979). The *per se* rule is ordinarily applied to price-fixing among competitors because that is an activity which almost always tends to restrict competition. *See Board of Regents*, 468 U.S. at 100, 104 S.Ct. at 2959; *see also, United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940).

In *Socony-Vacuum*, the Supreme Court explained that because of "their actual or potential threat to the central nervous system of the economy," all price-fixing agreements are banned without inquiry into their reasonableness. *Id.* at 224 n. 59, 60 S.Ct. at 845 n. 59. As plaintiffs correctly point out, a strong line of cases since *Socony-Vacuum* has firmly established that horizontal price-fixing arrangements are unreasonable on their face and are therefore *per se* violative of Section 1 of the Sherman Act, regardless of their reasonableness or possible justifications for their existence. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 432-35, 110 S.Ct. 768, 780-81, 107 L.Ed.2d 851 (1990); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 348-51, 102 S.Ct. 2466, 2475-76, 73 L.Ed.2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 646-47, 100 S.Ct. 1925, 1927, 64 L.Ed.2d 580 (1980).

The Sherman Act's protection against price-fixing extends to sellers of goods as well as buyers, *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 235-36, 68 S.Ct. 996, 1005-06, 92 L.Ed. 1328 (1948), and to providers of labor or services as well as providers of goods, *see, e.g., Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544-45 (10th Cir.1995).[9] Schemes to fix maximum prices are subject to the same antitrust scrutiny as are schemes to fix minimum or other uniform prices. *See, e.g., Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 347-48, 102 S.Ct. 2466, 2474-75, 73 L.Ed.2d 48 (1982). Therefore, the NCAA's attempt to fix the maximum compensation its members will pay to one class of employees for their coaching services is clearly an appropriate subject of examination under the Sherman Act.

On the authority of *Socony-Vacuum* and its progeny, plaintiffs in this case urge the Court to adopt the *per se* analysis and strike down the Restricted Earnings Coach Rule as an illegal price-fixing scheme without further inquiry into its

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[9] The parties agree that NCAA restricted earnings coaches are not unionized, that no collective bargaining agreement exists in this case, and that therefore no labor exemption from the antitrust laws applies.

reasonableness. Defendant argues persuasively, however, that although a *per se* analysis would normally apply in a case of horizontal price-fixing such as this, Supreme Court precedent forecloses application of the *per se* rule in this context.

In *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), the Supreme Court reviewed a music company practice of issuing "blanket licenses," which authorized licensees to use a number of copyrighted musical compositions for a set fee, and found that the practice did not constitute illegal price-fixing. The blanket license was a different product, in the Court's view, than the individual compositions: it included efficiencies in integrating sales, monitoring and enforcement that the individual composers could not achieve alone. *Id.* at 20-23, 99 S.Ct. at 1562-64. Thus the Court found that the blanket license was a cooperative arrangement in which the "agreement on price [wa]s necessary to market the product at all." *Id.* at 23, 99 S.Ct. at 1564. Under these unique circumstances, the Court held that cursory application of the *per se* rule would be inappropriate and, instead, determined that the agreement should be subjected to the more discriminating examination required under the rule of reason. *Id.* at 24, 99 S.Ct. at 1564-65.

The Supreme Court declined again to apply the *per se* rule in a later case involving the NCAA. In *NCAA v. Board of Regents of the Univ. of Oklahoma*, 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), the Court evaluated an NCAA plan which limited the conditions and prices that member institutions could negotiate in television contracts for college football games. Noting that "[w]hat the NCAA and its member institutions market ... is competition itself — contests between competing institutions," the Court found that the NCAA was "an industry in which horizontal restraints on competition are essential if the product is to be available at all." *Id.* at 101, 104 S.Ct. at 2960; *see also Banks v. NCAA*, 977 F.2d 1081, 1088 (7th Cir.1992), *cert. denied*, — U.S. —, 113 S.Ct. 2336, 124 L.Ed.2d 247 (1993); *Hennessey v. NCAA*, 564 F.2d 1136, 1152-53 (5th Cir.1977). Thus the Court decided again that it would be inappropriate to apply a *per se* rule, and it

instead chose to undertake the wider-ranging rule of reason inquiry. *See Board of Regents*, 468 U.S. at 100, 104 S.Ct. at 2959.

The NCAA's argument in this case, both for the application of the rule of reason rather than the *per se* rule and for its ultimate conclusion that the Restricted Earnings Coach Rule is a justifiable and necessary restraint of trade, substantially tracks the Supreme Court's reasoning in *Board of Regents*. Therefore, it will be useful to quote at length from that opinion. The Court there explained:

> A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of [sports] — college [sports]. The identification of this "product" with an academic tradition differentiates college [sports] from and makes [them] more popular than professional sports to which [they] might otherwise be comparable.... In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college [sports] to preserve [their] character, and as a result enables a product to be marketed which might otherwise be unavailable.

Id. at 101-02, 104 S.Ct. at 2960. Thus, the Court concluded that although the *Board of Regents* case involved restraints on the ability of member institutions to compete in terms of price and output, because of the NCAA's unique position in the marketplace for college sports, a fair evaluation of the competitive or anticompetitive character of the restraints required consideration of the NCAA's justifications for

adopting such restraints — a rule of reason rather than a *per se* analysis. *Id.* at 103, 104 S.Ct. at 2961.[10]

Although this Court concludes from the Supreme Court's analysis in *Board of Regents* that the NCAA's "vital role" in making college sports available to the public entitles it to a rule of reason review of the NCAA legislation at issue here, the Court does not believe that the Supreme Court intended to give the NCAA carte blanche in imposing restraints of trade on its member institutions or other parties because of its role in the marketplace. There can be no doubt that the NCAA is subject to the antitrust laws, and even though it escapes having the bylaw struck down as a *per se* violation of the Sherman Act, the NCAA still must justify the restraint under the rubric of the rule of reason.

C. The Rule of Reason

The Supreme Court first defined the rule of reason in *Board of Trade of City of Chicago v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918) ("*Chicago Board of Trade*"):

> The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court

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[10] The Court's decision to apply rule of reason analysis in *Board of Regents* does not necessarily mean that it adopted the same exception to the *per se* rule that it found applicable in *Broadcast Music*. In the end, although the NCAA argued that its actions, like the music companies' actions in *Broadcast Music*, constituted a cooperative "joint venture" which created efficiencies in the market and thus were procompetitive, the *Board of Regents* Court rejected the conclusion that the television rights in that case presented a situation similar to the one in *Broadcast Music*. Rather, the Court noted that "[u]nlike *Broadcast Music's* blanket license covering broadcast rights to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a non-competitive market." *Board of Regents*, 468 U.S. at 113-14, 104 S.Ct. at 2967. Plaintiffs argue here that they still attempt to sell their coaching services to NCAA member institutions which compete with each other in the hiring of coaches, only they too now do so in a non-competitive market.

> must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238, 38 S.Ct. at 244. The contours of the inquiry have remained largely unaltered since then. *See United States v. Brown University*, 5 F.3d 658, 668 n. 8 (3d Cir.1993). Basically, the test involves a balancing of all of the circumstances of the case to determine whether the challenged restraint unreasonably restricts competitive conditions. *See id.* at 668 (citing *Continental T.V. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568 (1977)). The fundamental inquiry under the rule of reason is the same as under the per *se rule*: what the competitive significance of the challenged restraint is and whether the restraint enhances competition. *Board of Regents*, 468 U.S. at 103-04, 104 S.Ct. at 2961. There is often no bright line separating rule of reason from *per se* analysis. *Id.* at 104 n. 26, 104 S.Ct. at 2961 n. 26.

Under the rule of reason, the plaintiff bears an initial burden of showing that the alleged agreement causes adverse, anticompetitive effects in the relevant market. *See Brown University*, 5 F.3d at 668. The plaintiff may satisfy this burden either by demonstrating actual anticompetitive effects or by offering proof of the defendant's market power. *Id.* Once the plaintiff has adduced sufficient evidence of actual anticompetitive effects or market power, "the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." *Id.* at 669. If the defendant does so, the burden shifts back to the plaintiff to show that the restraint is not reasonably necessary to accomplish the stated objective. *Id.* If the defendant does not offer any legitimate justifications, the finding of adverse competitive impact or market power prevails, and "'the court condemns the practice without ado.'" *Id.* (quoting *Chicago Professional Sports Ltd. Partnership v. National Basketball*

Ass'n, 961 F.2d 667, 674 (7th Cir.), *cert. denied*, 506 U.S. 954, 113 S.Ct. 409, 121 L.Ed.2d 334 (1992)).

In *Board of Regents*, the Supreme Court adopted a "quick look" rule of reason standard. This abbreviated inquiry applies in cases where *per se* condemnation of a practice is inappropriate, but where no elaborate industry analysis is necessary to reveal the anticompetitive character of an inherently suspect restraint. *Id.* (citing *Board of Regents*, 468 U.S. at 109, 104 S.Ct. at 2964). Thus, under the quick look standard because adverse effects on competition are apparent, the court does not require proof of market power, and instead moves directly to an analysis of the defendant's proffered competitive justifications for the restraint.

D. Effects of the Restricted Earnings Coach Rule

The NCAA first argues that the Restricted Earnings Coach Rule has no anticompetitive effect because restricted earnings coaches may avoid the restraining effect of the rule by obtaining coaching positions with high school teams, non-NCAA college teams, NCAA Division II or III teams, overseas teams or, in fact, by obtaining other employment not related to their coaching duties.[11] At best, this argument amounts to an assertion that because Division I restricted earnings coach positions represent such a small portion of the market, the NCAA has no market power in this arena and thus its restraint can have no adverse competitive impact.

This argument by the NCAA is wholly unconvincing. The absence of proof of market power does not foreclose a finding of anticompetitive behavior under the Sherman Act. *See Board of Regents*, 468 U.S. at 109, 104 S.Ct. at 2964. In fact, where there is an agreement not to compete in terms of price, " 'no

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[11] Defendant's argument — essentially that price-fixing victims can simply go elsewhere and get a job in another part of the economy that is not fixed — is, of course, absurd and cannot carry the day for the NCAA in this litigation. *See, e.g., Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995) ("plaintiffs whose opportunities in the employment market have been impaired by an anticompetitive agreement directed at them as a particular segment of employees have suffered an antitrust injury under the governing standard").

elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement.'" *Id.* (quoting *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1366, 55 L.Ed.2d 637 (1978)). Where a restraint runs counter to the Sherman Act's requirement that price be responsive to consumer preference, proof of market power is unnecessary because such an agreement's anticompetitive character is evident. *See Board of Regents*, 468 U.S. at 110, 104 S.Ct. at 2965.

The NCAA acknowledges that before the rule was enacted, some restricted earnings coaches were paid $60,000 to $70,000 — apparently because the schools that employed them believed their services were worth that amount. Controlling such responses to consumer preference was in fact the very objective which the NCAA sought to achieve in enacting the rule. Sometimes the rule of reason may be applied "in the twinkling of an eye," *Id.* at 109 n. 39, 104 S.Ct. at 2964 n. 39 (quoting P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37-38 (Federal Judicial Center, June 1981)); and this is surely one such case. Because the Restricted Earnings Coach Rule specifically prohibits the free operation of a market responsive to demand and is thus inconsistent with the Sherman Act's mandates, it is not necessary for the Court to undertake an extensive market analysis to determine that the rule has had an anticompetitive effect on the market for coaching services.

The NCAA next argues that its regulation may even be procompetitive because, if the NCAA does not collapse as a result of its skyrocketing costs, it will be able to continue providing the product of college basketball and there will thus continue to be jobs available in the market for basketball coaches. For all its alarming rhetoric, however, the NCAA has offered no compelling evidence that its member institutions are on the brink of financial disaster or that the *de minimus* effect which reducing the salaries of the lowest paid member of each school's coaching staff by a few thousand dollars would pull them back from the abyss. Moreover, even if the situation of intercollegiate athletics was every bit as dire as the NCAA makes it out to be in resisting the coaches' challenge to the

Restricted Earnings Coach Rule, the NCAA's argument — that the regulation is procompetitive because it will help the NCAA schools stay in the black so that they can continue providing intercollegiate athletics at all — cannot succeed.

The market for coaching services is different from the market for intercollegiate sports. In the market for coaching services, coaches are the producers and schools are the consumers, whereas in the market for intercollegiate sports, the schools become the producers and the public the consumers. Procompetitive justifications for price-fixing must apply to the same market in which the restraint is found, not to some other market. *See United States v. Topco Assoc., Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972) (competition "cannot be foreclosed with respect to one sector of the economy because certain private citizens or groups believe that such foreclosure might promote greater competition in a more important sector of the economy"); *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 370, 83 S.Ct. 1715, 1745, 10 L.Ed.2d 915 (1963) (anticompetitive effects in one market cannot be justified by procompetitive consequences in another); *Sullivan v. National Football League*, 34 F.3d 1091, 1112 (1st Cir.1994) (it seems "improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market"), *cert. denied*, — U.S. —, 115 S.Ct. 1252, 131 L.Ed.2d 133 (1995). If price-fixing buyers were allowed to justify their actions by claiming procompetitive benefits in the product market, they would almost always be able to do so by arguing that the restraint was designed to reduce their costs and thereby make them collectively more competitive sellers. To permit such a justification would be to give businesses a blanket exemption from the antitrust laws and a practically limitless license to engage in horizontal price-fixing aimed at suppliers. This license the Court will not issue — even in the unique context of intercollegiate athletics.

E. NCAA Justifications for the Restricted Earnings Coach Rule

Because the Restricted Earnings Coach Rule constitutes a restraint on the operation of a free market, and because the

uncontroverted facts demonstrate that its effect has been to stabilize and, in some cases, depress prices in the market for coaching services, the rule of reason next places on the NCAA a "heavy burden of establishing an affirmative defense which competitively justifies" this infringement on the Sherman Act's protected domain. *See Board of Regents*, 468 U.S. at 113, 104 S.Ct. at 2966-67.

The NCAA attempts to carry its burden by emphasizing the importance of maintaining a level playing field in the sports arena, retaining and fostering the spirit of amateurism which is one of college athletics' defining characteristics, and protecting NCAA member institutions from self-imposed, ruinous cost increases.[12] In doing so, the NCAA relies heavily on two earlier cases which held that NCAA coaching restrictions were not inconsistent with the antitrust laws and were, in fact, legitimate and necessary means of maintaining competitive equity and the other values the NCAA seeks to protect. Those cases are: *Board of Regents of the Univ. of Oklahoma v. National Collegiate Athletic Ass'n*, 561 P.2d 499 (Okla.1977) ("*Oklahoma Board of Regents*"), and *Hennessey v. National Collegiate Athletic Ass'n*, 564 F.2d 1136 (5th Cir.1977).

The *Hennessey* case and the *Oklahoma Board of Regents* case, decided well before the Supreme Court issued its opinion

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[12] The NCAA also asserts that by enforcing the Restricted Earnings Coach Rule it is maintaining an "entry-level" position for coaches who are young and/or inexperienced in the field. By enacting the salary cap, the NCAA sought to level the playing field by weeding out more experienced and seasoned coaches; ostensibly, more experienced coaches would not be willing to work for only $16,000 per year. However, the NCAA has introduced no evidence whatsoever that its method has been effective in making more opportunities available for younger or more inexperienced coaches. Nor has it introduced evidence that any seasoned coaches who were drawing $60,000 to $70,000 under the old salary regime have ceded their positions to the younger and more inexperienced coaches waiting to fill their shoes. In fact, the NCAA has not introduced evidence of a single restricted earnings coaching position which has been made available to a younger, more inexperienced coach that would not have been available in the previously unrestricted market for coaching services.

in *Board of Regents*, were both challenges to an NCAA bylaw adopted in 1976 that limited the number of Division I football and basketball coaches member institutions could employ. In upholding the bylaw, the Fifth Circuit in *Hennessey* and the Oklahoma Supreme Court in *Oklahoma Board of Regents* both gave deference to the NCAA's motives in enacting the challenged restriction. In *Hennessey*, the court noted that plaintiffs had presented no evidence that the NCAA intended to *injure* the affected coaches by adopting the bylaw and that, to the contrary, "the fundamental objective in mind was to preserve and foster competition in intercollegiate athletics — by curtailing, as it were, potentially monopolistic practices by the more powerful — and to reorient the programs into their traditional role as amateur sports operating as part of the educational processes." *Hennessey*, 564 F.2d at 1153. The NCAA, of course, asserts the same motivating objective in this litigation.

Significantly, in attempting to balance the NCAA's professed good intentions with the anticompetitive nature of the coaching restriction, the *Hennessey* court noted that on the evidence presented, it was difficult to determine what the actual effects of the restriction would be, since the rule had only been in effect for one month. *See id.* The court recognized that one possible consequence of that bylaw would be to "stabilize, if not depress, the compensation which any assistant coach can obtain for his services." *Id.* However, the court concluded that if that should happen and actual experience under the bylaw run counter to the NCAA's expectations and good intentions, a court could certainly consider that evidence in reevaluating the restraint in a later case. *See id.* at 1154.

In contrast to the bylaw at issue in *Hennessey*, the explicit intent of the Restricted Earnings Coach Rule at issue here was both to stabilize *and* depress the compensation of restricted earnings coaches. This Court therefore does not need the experience of time which the *Hennessey* court felt it was lacking in order to make a judgment about the potential effects of the restraint. Moreover, we believe that the *Hennessey* court placed undue emphasis on the NCAA's stated good intentions — not only in light of the Supreme Court's clear articulation

of the proper antitrust analysis in *Board of Regents*, but also in light of clearly established precedent existing at the time of the *Hennessey* decision itself. Although intent is relevant in helping a court interpret facts and predict consequences in this type of case, "a good intention will [not] save an otherwise objectionable regulation...." *Chicago Board of Trade*, 246 U.S. at 238, 38 S.Ct. at 244; *see also Board of Regents*, 468 U.S. at 101 n. 23, 104 S.Ct. at 2960 n. 23 ("it is ... well settled that good motives will not validate an otherwise anticompetitive practice").

Similarly, in *Oklahoma Board of Regents*, the court deferred to the NCAA membership's "avowed" purpose in enacting the limitation of coaching staffs, which was maintaining the principles of a level playing field and the spirit of amateurism through cutting costs. The Oklahoma Supreme Court noted there that it was the "considered opinion of a majority of the [member institutions] that a limit on coaching staffs [wa]s the best way to achieve [those] goals," and it declined to substitute its own judgment for theirs. *Oklahoma Board of Regents*, 561 P.2d at 507. Since the plaintiff in that case did not establish that it was *un* reasonable for the NCAA to concern itself with those goals, and since the plaintiff could not demonstrate that the bylaw would *not* effect the cost reduction and competitive equity that the NCAA sought to achieve, the Oklahoma court found in favor of the NCAA.

The Supreme Court in *Board of Regents*, however, clarified that the burden of proof in an antitrust case is somewhat different from what the Oklahoma court articulated: under the rule of reason, the proponent — not the challenger — of a facially anticompetitive measure carries "a heavy burden of establishing an affirmative defense which competitively justifies [such an] apparent deviation from the operations of a free market." *Board of Regents*, 468 U.S. at 113, 104 S.Ct. at 2966.[13] The NCAA has repeatedly and

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[13] Another statement in *Oklahoma Board of Regents* requires comment here because the NCAA in briefs submitted to this Court misconstrues its significance. In support of its argument that Bylaw 11.02.3 is reasonable, the NCAA cites the Oklahoma Supreme Court's statement that "[t]he

vigorously urged this Court to shift the burden and require the coaches here to "prove a negative" — that the Restricted Earnings Coach Rule is *un* justifiable under rule of reason antitrust analysis. In support, the NCAA quotes the following language from *Board of Regents*:

> It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

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fundamental test of the reasonableness of restraint is its effect on the public." *Oklahoma Board of Regents*, 561 P.2d at 506. The NCAA's argument goes something like this: the cost spiral of personnel expenses under which the NCAA currently labors, if not curbed, will eventually and inevitably cause the complete demise of intercollegiate athletics; since Bylaw 11.02.3 cuts costs, it forestalls such demise and is thus good for the public interest because the public enjoys intercollegiate athletics. Even if the NCAA's scenario is a true depiction of the current economic landscape of intercollegiate athletics, the Supreme Court has emphasized that the actual test for reasonableness is much more limited: the relevant test is the restraint's effect on economic competition, not merely on the public interest. *See Board of Regents*, 468 U.S. at 104, 113, 104 S.Ct. at 2962, 2966-67. The Oklahoma court in mentioning the public interest may have had in mind not the wide-ranging reasonableness test that the NCAA urges us to adopt here, but something more akin to the Tenth Circuit's recent holding in an antitrust case — that the public's interest is in "open and unrestrained competition." See *Reazin v. Blue Cross and Blue Shield of Kansas, Inc.*, 899 F.2d 951, 974 (10th Cir.) (jury instruction defining public interest as "open and unrestrained competition" did not invite jury to consider matters other than effects of restraint on competition), *cert. denied*, 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990). The public's interest in and enjoyment of intercollegiate sports is, in this case, entirely irrelevant.

Id. at 117, 104 S.Ct. at 2969. This language does not create a presumption of reasonableness for any regulation the NCAA chooses to enact, nor does it alter the burden of proof. Rather, the Court's general observation merely reiterates its previous comment that certain regulations which may restrain economic competition — rules dictating the size of the field, the number of players on each team, the extent to which physical violence should be allowed, that athletes should not be paid and that they must attend class — are crucial to the well-being of amateur athletic competition. *See id.* at 101-02, 104 S.Ct. at 2960. Moreover, the regulations referred to by the *Board of Regents* court are qualitatively a far cry from a regulation limiting the amount of compensation a professional coach, or even a graduate student assistant coach, can earn as a livelihood for providing services to NCAA member schools.[14]

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[14] The NCAA's argument that the Restricted Earnings Coach Rule preserves the spirit of amateurism strays from the concept of amateurism as it was originally conceived by the NCAA and as it is discussed in other cases.

Defendant relies heavily on *Banks* v. *NCAA*, 977 F.2d 1081 (7th Cir. 1992), and *Justice* v. *NCAA*, 577 F. Supp. 356 (D. Ariz.1983), in advancing its argument that the NCAA must be afforded plenty of room under the antitrust laws in order to preserve the amateur character of intercollegiate sports contests; however, neither case is on point. *Banks* dealt with no-draft and no-agent eligibility rules imposed by the NCAA on student-athletes; *Justice* involved sanctions imposed upon an NCAA member institution for infractions of NCAA rules against providing compensation and other benefits to student-athletes. Those cases are about ensuring that college *players* — student-athletes — are amateurs; they are not about preserving the amateurism of *coaches* by capping their salaries or by any other means. Likewise, the article of the NCAA's own constitution defining the principle of amateurism refers only to student-athletes:

> Student-athletes shall be amateurs in an intercollegiate sport, and their participation should be motivated primarily by education and by the physical, mental and social benefits to be derived. Student participation in intercollegiate athletics is an avocation, and *student-athletes* should be protected from exploitation by professional and commercial enterprises.

In this litigation, the NCAA attempts to obtain leniency for its restricted earnings salary cap by characterizing it as a noncommercial regulation. The NCAA cites the district court's opinion in *Board of Regents* to support its position that noncommercial activities of the NCAA are reasonable methods of preserving competition in college sports. Finding previous cases regarding noncommercial NCAA regulations inapposite to its evaluation of the commercial restrictions on television contracts at issue, the court in that case noted,

> Several courts have analyzed the non-commercial activities of NCAA and concluded that they were reasonable methods of preserving and regulating competition in intercollegiate football.... However, none of these cases dealt with the commercial activities of NCAA. These [commercial] activities are far different from regulations governing the size of coaching staffs or rules on academic eligibility. There is only a tenuous relationship between such non-commercial regulations and the marketplace.

NCAA 1994-95 Manual, Const. 2.8 (emphasis added).

In this litigation, the NCAA has not indicated any way in which the Restricted Earnings Coach Rule would enhance amateurism among student-athletes in the way that other regulations designed to foster amateurism have done so.

Referring to cases where sports associations had regulated permissible racquet size in tennis, player safety requirements in hockey, and drug use in horse showing, the *Justice* court noted that "actions by sports organizations in preserving the integrity of the sport and fair competition are reasonable restraints under the rule of reason, even if they operate to exclude some competitors and thus have an incidental anticompetitive effect." *Justice*, 577 F.Supp. at 382 n. 17. The NCAA attempts to use this statement to support its position that the Restricted Earnings Coach Rule is a reasonable restraint of trade. However, not only is the statement dicta, from an inapposite case, taken out of context, but it also underscores a fundamental problem in defendant's case: namely, that the NCAA has not proven that the Restricted Earnings Coach Rule was implemented to "preserv[e] the integrity of the sport and fair competition." Furthermore, the NCAA has not proven that the Restricted Earnings Coach Rule's anticompetitive effect is merely "incidental" to the action.

> Moreover, the non-commercial regulations relate more directly and effectively to the preservation of competitive balance. In this case, the commercial activities of NCAA have a direct and substantial anti-competitive effect on the marketplace, and contribute only indirectly, if at all, to the legitimate non-commercial goals of NCAA.

Board of Regents of the Univ. of Oklahoma v. National Collegiate Athletic Ass'n, 546 F.Supp. 1276, 1316 (W.D. Okla.1982) (citations omitted). The NCAA has not persuaded this Court that the relationship between the Restricted Earnings Coach Rule's salary cap and prices in the market for coaching services is at all tenuous or indirect. On the contrary, the relationship is direct, substantial and demonstrable. As the NCAA admits, the rule is directly responsible for a reduction in certain coaches' salaries. Furthermore, the NCAA has not demonstrated through any plausible evidence that the rule's restraint relates directly and effectively to the preservation of competitive balance, amateurism or any other legitimate, *non* commercial goal; instead, it offers only argument on this point. It is far from clear to this Court that the act of imposing a ceiling on the salaries of one class of employees in the labor market could possibly be characterized as "noncommercial," especially given the NCAA's express purpose of cutting costs in doing so.

While the Supreme Court in *Board of Regents* accepted competitive balance as a legitimate objective for the NCAA and was willing to assume that most NCAA regulations are justifiable means of accomplishing that objective, the Court required that regulations with anticompetitive effects be somehow related or tailored to the interests they purport to protect. *See Board of Regents*, 468 U.S. at 118-19, 104 S.Ct. at 2969. Because the television restrictions in that case were not closely tailored to the NCAA's proffered justifications regarding competitive balance and amateurism — the same justifications the NCAA offers here — the Court invalidated the restraints. *Id.* For purposes of this motion, the Court accepts that cost-cutting measures are needed, that amateurism and competitive equity should be maintained, and that retaining a coaching position for an entry-level coach benefits both

coaches and NCAA member institutions. Nevertheless, the NCAA has not demonstrated the necessary link between these stated objectives and the Restricted Earnings Coach Rule.

"Even if an anticompetitive restraint is intended to achieve a legitimate objective, the restraint only survives a rule of reason analysis if it is reasonably necessary to achieve the legitimate objectives proffered by the defendant." *Brown University*, 5 F.3d at 678-79. To determine if a restraint is reasonably necessary, a court first examines whether the restraint furthers the legitimate objectives, and then whether comparable benefits could be achieved through substantially less restrictive means. *Id.* at 679; *see also North American Soccer League v. National Football League*, 670 F.2d 1249, 1261 (2d Cir.), *cert. denied*, 459 U.S. 1074, 103 S.Ct. 499, 74 L.Ed.2d 639 (1982).

The NCAA has not cleared the first of these two hurdles. As noted previously, the NCAA has offered no evidence that the Restricted Earnings Coach Rule furthers its stated objectives at all. The NCAA's stated objectives are to level the playing field to obtain competitive equity, to provide for an entry-level coaching position and to cut costs. The NCAA has submitted no evidence to this Court that requiring schools to pay their fourth-ranked basketball coaches all the same low salary levels the playing field in any significant way, especially when there is no limit on how disparately the three more senior coaches may be paid by competitor schools. Similarly, the NCAA has presented no evidence that the restricted earnings coach positions are now more likely to be filled by young or inexperienced coaches than they were when salaries were competitive. Nor has the NCAA offered any evidence that the Restricted Earnings Coach Rule really achieves an overall reduction in costs; as stipulated by the parties, nothing in the Restricted Earnings Coach Rule prevents NCAA schools from spending money saved (if any) from fixing the restricted earnings coach's salary on some other aspect of their basketball programs, such as increasing the head coach's salary. Because the NCAA has failed to meet its burden of establishing that the Restricted Earnings Coach Rule actually promotes a legitimate, procompetitive objective, it is unnecessary for plaintiffs to

demonstrate that the Restricted Earnings Coach Rule is the least restrictive alternative available to the NCAA to achieve its stated goals or that comparable benefits could be achieved through viable, less restrictive means.

Because the Restricted Earnings Coach Rule is a restraint of trade as prohibited by the Sherman Act, the NCAA bears a heavy burden in this case to establish that the restraint enhances competition or, in other words, promotes a legitimate, procompetitive goal. On this record, the Court finds that the NCAA has not met this weighty burden and that plaintiffs are entitled to judgment as a matter of law on the issue of liability.

IT IS THEREFORE ORDERED that *Plaintiffs' Motion for Summary Judgment on the Issue of Liability* (Doc. # 73) be and hereby is sustained.

APPENDIX I

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, individually and on behalf of others similarly situated, Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant-Appellant,

and

William Hall, Amicus Curiae.

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., Charles M. Rieb, Doug Schreiber, Lazaro Collozzo, Robin Dreizler, Frank Cruz, on behalf of themselves and all others similarly situated, Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant-Appellant.

and

Norman LAW, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, individually and on behalf of others similarly situated, Plaintiffs-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Defendant-Appellant.

No. 96-3034, 96-3150, 96-3186 & 96-3200

March 13, 1998

ORDER

Before **EBEL**, **LOGAN**, and **KELLY**, Circuit Judges.

The petitions for rehearing in 96-3034, 96-3150 and 96-3186, *Law v. National Collegiate Athletic Association*, are denied.

The suggestions for rehearing en banc were transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No poll was requested so the suggestion for rehearing en banc is also denied.

Our mandate in number 96-3200, *Law v. National Collegiate Athletic Association*, is recalled and will reissue with the mandates in the related cases seven days after entry of this order. *See* Fed. R. App. P. 41(a). This is done so that the daily sanctions stayed by our order of May 7, 1996, which was rescinded in our opinion filed January 23, 1998, will begin to run upon reissuance of the mandate in that case.

Entered for the Court
PATRICK FISHER
Clerk of Court

Supreme Court, U.S.
FILED
AUG 10 1998
OFFICE OF THE CLERK

(2)

No. 97-2004

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,
PETITIONER,

v.

NORMAN LAW, ANDREW GREER, PETER HERRMANN,
MICHAEL JARVIS, JR., CHARLES M. RIEB, DOUG SCHREIBER,
LAZARO COLLAZO, ROBIN DREIZLER AND FRANK CRUZ,
INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY
SITUATED, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In 1992, the members of the National Collegiate Athletic Association ("NCAA" or "petitioner"), as part of a concerted cost reduction effort, adopted Bylaw 11.02.3 (the "REC rule"), which placed caps of $12,000 for the academic year and $4,000 for the summer on the compensation of the lowest ranking coaches (designated "restricted earnings coaches") in all NCAA Division I sports except Division I-A football. Based upon the "quick look" rule of reason analysis utilized by this Court in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85 (1984) ("*NCAA v. Board of Regents*"), the Tenth Circuit affirmed the district court's interlocutory order granting summary judgment in favor of respondents on the issue of liability.

The question presented is:

Whether the district court and the court of appeals properly applied the "quick look" rule of reason to find that the REC rule—a horizontal agreement among competing employers setting the maximum compensation to be paid to some coaches—violated Section 1 of the Sherman Act, where the NCAA admitted the anticompetitive effects of the rule and failed to offer any substantial procompetitive justifications?

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Respondents Norman Law, Andrew Greer, Peter Herrmann, Michael Jarvis, Jr., and Charles M. Rieb, individually and on behalf of all others similarly situated, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Tenth Circuit's opinion in this case.[1] That opinion (Pet. App. 1a-26a) is reported at 134 F.3d 1010. The underlying district court opinion (Pet. App. 74a-100a) is reported at 902 F. Supp. 1394.

STATEMENT

The court of appeals decision was a straightforward application of well-settled antitrust principles to a horizontal agreement among competing employers to fix their employees' salaries. The decision does not conflict with the rulings of any other court; it does not impede petitioner's legitimate efforts to regulate intercollegiate sports; and it does not present any important issue that warrants resolution by this Court. At bottom, this case involves horizontal price-fixing which, for any other defendant, would be a *per se* violation of the Sherman Act. Solely because it is the NCAA, petitioner avoided *per se* liability and was afforded a full opportunity to justify conduct that is universally condemned without any analysis of competitive effects. In short, petitioner received more, not less, opportunity to defend itself against claims of horizontal price-fixing. Petitioner failed the test, not because the courts below failed to give it adequate opportunity to defend

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[1] Although the petition poses only a single question for review, it purports to seek certiorari with respect to multiple judgments of the Tenth Circuit, including opinions of the court of appeals that neither considered nor decided the issue of substantive antitrust liability recited in the petition. *See* Pet. 1 & n.1, 6 n.2. Only one of the Tenth Circuit's decisions on interlocutory appeals addresses antitrust liability issues (Pet. App. 1a-26a). And the only respondents who were parties to that decision and that judgment were respondents Law, Greer, Herrmann, Jarvis, and Rieb, individually and on behalf of all others similarly situated. *See* Pet. App. 1a, 74a. Although the petition denominates other parties as respondents, (Schrieber, Collazo, Dreizler, Cruz), they are not parties to the only judgment in which the Tenth Circuit resolved substantive antitrust liability issues; they are coaches in sports other than basketball and are parties only to other Tenth Circuit judgments as to which the petition presents no question for this Court's review.

itself, but because its defense, far from justifying the REC rule, actually removed any doubt as to its anticompetitive effect.

Lacking any meritorious basis for this Court's review, the petition misstates the issues decided below, ignores dispositive authorities of this Court and exaggerates the significance of the case. The main point in the petition -- that buyer price fixing should be treated more leniently than seller price-fixing -- was not presented to the district court or to the court of appeals prior to the panel's opinion. As such, it was not addressed or decided by the court of appeals, and is not properly before this Court. In any event, that argument is directly contrary to several decisions of this Court that are not even cited in the petition.

In an attempt to avoid the "price-fixing" label entirely, petitioner misleadingly lumps two separate NCAA bylaws together, defining them jointly as the "REC Rule." Pet. 4. In fact, this case involves only NCAA Bylaw 11.02.3, which caps the salaries of "restricted earnings coaches." It does not involve Bylaw 11.6.4, which limits the number of coaches in each sport.

The petition repeatedly overstates the import of the decision below. Refusing to acknowledge that this case involves only garden-variety price fixing, petitioner claims that the Tenth Circuit's ruling implicates a wide range of NCAA regulations and even "places in grave doubt the future of competitive intercollegiate athletics." Pet. 29. There is simply no basis for the fanciful hyperbole that the future of intercollegiate athletics depends on the ability of NCAA members to collude on the salaries of their lowest paid coaches. Competitive intercollegiate athletics thrived for decades before the adoption of the REC rule in 1992, and has continued to thrive in the three years since the rule was invalidated and rescinded in 1995.

FACTUAL BACKGROUND

NCAA Bylaw 11.02.3 became effective in 1992. It limited the permissible compensation of "restricted earnings coaches"[2] to

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[2] Only the lowest ranking coach in each sport had his or her compensation capped by the rule. The amount of compensation that member institutions

$12,000 and $4,000 for academic year and summer salaries, respectively. The NCAA's "Cost Reduction Committee" formulated and proposed this bylaw to the membership with the officially stated "rationale" of "more effectively limiting compensation to such coaches." Pltff's C.A. App. 123.

The REC rule succeeded in achieving its stated aim of reducing costs by eliminating competition among Division I institutions for the services of "restricted earnings" coaches. Those coaches' "compensation and ability to negotiate with Division I institutions is or has been limited by the [REC] rule." NCAA C.A. App. 24–25, 567–68. "As a result, salaries paid to such coaches . . . have been artificially depressed below the amount those coaches would have received had they been able to negotiate with NCAA Division I institutions individually." *Id. at* 37, 588–89. *See* D. Kan. R. 56.1.

Restricted earnings coaches in men's basketball filed suit in November 1993 in the United States District Court for the Central District of California. In January 1994 the case was transferred on the NCAA's motion to the District of Kansas. After full discovery, the district court granted respondents' motion for summary judgment on liability. It declined to apply the *per se* rule of illegality usually applied to price fixing but, following this Court's analysis in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), held that where the "adverse effects [of a restraint] on competition are apparent, the court does not require proof of market power, and instead moves directly to an analysis of the defendant's proffered competitive justifications for the restraint." Pet. App. 89a. It held that such anticompetitive effects are apparent where, as in this case, "there is an agreement not to compete in terms of price" that is effective in reducing at least some salaries below competitive levels by "specifically prohibit[ing] the free operation of a market responsive to demand." *Id.* at 89a–90a.

On May 25, 1995, the day after the district court's ruling, the NCAA rescinded the REC rule's restrictions on compensation. Shortly thereafter, several NCAA member institutions and confer-

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were allowed to pay their head coaches and other assistant coaches remained unlimited.

ences introduced formal proposals to reinstate, under a new name, limitations on the salaries of coaches whose compensation had been restricted by the REC rule. NCAA C.A. App. 1056–69. With the NCAA poised to vote on those proposals at its 1996 convention, the district court entered an injunction. *Id.* at 1100. The NCAA appealed.[3]

The Tenth Circuit unanimously affirmed. Pet. App. 1a-26a. Like the district court, it rejected application of the *per se* rule,[4] utilizing instead the "quick look rule of reason analysis" of *NCAA v. Board of Regents*. Pet. App. 17a. The Court of Appeals held that "anticompetitive effect is established, even without a determination of the relevant market, where the plaintiff shows that a horizontal agreement to fix prices exists, that the agreement is effective, and that the price set by such an agreement is more favorable to the defendant than otherwise would have resulted from the operation of market forces." *Id.* The court observed that the NCAA had admitted facts that established such an effect in this case:

> "[T]he undisputed evidence supports a finding of anticompetitive effect. The NCAA adopted the REC Rule to reduce the high cost of part-time coaches' salaries, over $60,000 annually in some cases, by limiting compensation to entry-level coaches to $16,000 per year. *The NCAA does not dispute that the cost-reduction has effectively reduced restricted-earnings coaches' salaries. Because the REC Rule was successful in artificially lowering the price of coaching services, no further evidence or analysis is required to find market power to set prices.* Thus, in the case at bar, the district court did not need to resolve issues of fact pertaining to the definition of the relevant market

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[3] The injunction, like the summary judgment ruling, affected only compensation limitations, and had no bearing on numerical limits and other coaching staff regulations.

[4] In the court of appeals' view, "all horizontal agreements among NCAA members, even those as egregious as price-fixing, should be subject to a rule of reason analysis." App. 14a–15a.

> in order to support its decision on summary judgment that the REC Rule is a naked price restraint."

Id. at 18a (emphasis added).

The court of appeals also agreed with the district court that the justifications offered by the NCAA in defense of the REC rule were insufficient as a matter of law. First, the court perceived that the NCAA's argument that the rule would preserve entry-level coaching positions had no bearing on the proper analysis to the extent that argument sought to promote the rule's "social value apart from its effect on competition" (*id.* at 20a); and it observed that in any event "the REC Rule contained no restrictions other than salary designed to insure that the position would be filled by entry-level applicants." *Id.* at 21a. Second, the court of appeals rejected the NCAA's cost-reduction justification, recognizing the inherent incongruity of the notion "that the goal of cost reductions can serve as a legally sufficient justification for a buyers' agreement to fix prices even if such cost reductions are necessary to save inefficient or unsuccessful competitors from failure" (*id.* at 24a). In any event, there was "no evidence that limits on restricted-earnings coaches' salaries would be successful in reducing deficits, let alone that such reductions were necessary to save college basketball." *Id.* Third, the court discerned that the NCAA's purported justification of maintaining competitiveness failed because "[t]he undisputed record reveals that the REC Rule is nothing more than a cost-cutting measure and shows that the only consideration the NCAA gave to competitive balance was simply to structure the rule so as not to exacerbate competitive imbalance." *Id.* at 25a. Finally, the court rejected the NCAA's plea for a "'wait and see' approach to give the rule time to succeed" because to do so would improperly "free the NCAA . . . from its burden of showing that the procompetitive justifications for a restraint on trade outweigh its anticompetitive effects." *Id.* at 26a.

The court of appeals decisively distinguished *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977), on numerous grounds, including the dispositive fact that *Hennessey* involved limits on the number, not the salaries, of coaches. Pet. App. 19a. The Tenth Circuit also pointed out that *Hennessey* predated this Court's decision in *NCAA v. Board of Regents*. Moreover, in *Hennessey* the

Fifth Circuit had incorrectly placed on plaintiffs the burden of proving the unreasonableness of the restraint. *Id.* In contrast, many other courts, including this one, correctly place the burden on defendants to demonstrate any procompetitive virtues of horizontal restraints. Pet. App. 19a. It was that burden that the NCAA failed to meet. *Id.* at 20a–25a.

The court of appeals unanimously denied the NCAA's petition for rehearing and suggestion for rehearing en banc. Pet. App. 101a–102a. Petitioner now seeks interlocutory review by this Court of the Tenth Circuit's decision on liability, even while litigation on other issues remains pending in the district court.[5]

REASONS FOR DENYING THE PETITION

The decision below correctly applied well-settled principles to the record in this case. The decision of the Tenth Circuit is in accord with controlling decisions of this Court, does not conflict with other courts of appeals and does not present any issue that warrants further review.

The utter hollowness of the petition is reflected in the fact that its principal argument -- that the antitrust laws distinguish buyer price fixing from seller price fixing -- was never presented below prior to the Tenth Circuit decision. It was offered for the first and only time in the petition for rehearing in the court of appeals and played no role in the decision for which review is sought. That argument, moreover, is contrary to several decisions of this Court, all but one of which the petition omits entirely.

The various purported "conflicts" alleged in the petition are not conflicts at all. Rather, they are the product of petitioner's misstatements of (1) the REC rule, (2) the scope of the Tenth Circuit's decision and (3) the holdings in other cases. Among the petition's more glaring deficiencies is its omission of intervening de-

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[5] At a subsequent trial on damages (which is not before this Court), the jury found that the REC rule had caused "widespread injury" and that some 1,900 coaches had suffered a total of $22.3 million in damages, $11.2 million of which had been suffered by coaches in men's basketball. Post-trial motions are pending.

cisions of this Court with which the Tenth Circuit's ruling is in full accord.

The Tenth Circuit applied well-settled law in holding that, where the anticompetitive effect of a horizontal restraint is both obvious on the face of the restraint and undisputed on the factual record, the burden is on the defendant to justify the restraint in competitive terms. Its conclusion that petitioner failed to do so is specific to the facts of this case and in any event is fully supported by the record.

I. PETITIONER'S PRINCIPAL ARGUMENT WAS NOT RAISED IN THE DISTRICT COURT OR THE COURT OF APPEALS, AND IS NOT PROPERLY BEFORE THIS COURT.

Petitioner's principal argument, that the antitrust laws treat (or should treat) restraints imposed by combinations of competing buyers more leniently than restraints imposed by combinations of competing sellers, was made for the first time in its petition for rehearing in the court of appeals. As such, it was not properly before the court of appeals, *Sierra Club v. Hodel*, 848 F.2d 1068, 1100–01 (10th Cir. 1988) (opinion on rehearing), was not addressed or decided in the Tenth Circuit opinion, and is not properly before this Court. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981). In any event, it is contrary to settled law and does not warrant review by this Court.

II. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR OF ANY OTHER COURT OF APPEALS

A. There Is No Conflict Regarding Application of the Antitrust Laws to Restraints Imposed By Combinations of Buyers as Opposed to Combinations of Sellers

The court of appeals' decision applied well-settled law to a naked horizontal price restraint. Without citing any contrary holding, the petition repeatedly suggests that the decision below

creates a conflict regarding the application of Section 1 of the Sherman Act to combinations of buyers as opposed to sellers. As noted above, this argument was made for the first time in the petition for rehearing and is not properly before this Court. It is also flatly wrong.

This Court has repeatedly held that the Sherman Act applies with equal force to horizontal price fixing by buyers (including employers) and horizontal price fixing by sellers. *Radovich v. National Football League*, 352 U.S. 445, 453–54 (1957) (employers); *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235 (1948) (buyers of sugar beets); *Anderson v. Shipowners Ass'n of the Pacific Coast*, 272 U.S. 359, 364–65 (1926) (employers). This Court recently summarized the governing principle that "antitrust law forbids all agreements among competitors (such as competing *employers*) that unreasonably lessen competition among or between them in virtually any respect whatsoever." *Brown v. Pro Football, Inc.*, 518 U.S. 231, 241 (1996) (emphasis added).

Inexplicably, the petition cites only one of those cases, and ignores all cases that refer specifically to employer combinations. It also fails to cite any of the numerous lower court decisions to the same effect. *E.g.*, *Roman v. Cessna Aircraft Co.*, 55 F.3d 542, 544 (10th Cir. 1995) (employers); *Quinonez v. National Ass'n of Securities Dealers, Inc.*, 540 F.2d 824, 828–29 (5th Cir. 1976) (employers); *International Ass'n of Heat & Frost Insulators v. United Contractors Ass'n*, 483 F.2d 384, 393 (3d Cir. 1973) (employers); *National Macaroni Mfrs. Ass'n v. FTC*, 345 F.2d 421, 426–27 (7th Cir. 1965) (buyers of macaroni ingredients); *Cordova v. Bache & Co.*, 321 F. Supp. 600, 606 (S.D.N.Y. 1970) (employers).[6]

Petitioner suggests that because reduction of costs is the goal of every buyer, the antitrust laws should favor buyer cartels, such

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[6] All the cases cited at Pet. 10 n.3 involved NCAA rules governing athlete eligibility. Such rules usually pass muster under the rule of reason, not because they are input restrictions, but because they are necessary "to preserve the character and quality of the 'product'" of amateur intercollegiate athletics. *NCAA v. Board of Regents*, 468 U.S. at 102. *See infra*, pp. 17-18.

as this one, that relieve buyers of the need to compete in a free market for their necessary inputs, including labor. This would indeed be a drastic new direction for antitrust law. As a commentator quoted by petitioner has written, "the law is clear that conspiracies to restrain competition in an input market are just as much a target of antitrust law as restraints in output markets." Gary R. Roberts, *The NCAA, Antitrust, and Consumer Welfare*, 70 TULANE L. REV. 2631, 2643–44 (1996).

Radovich, one of the pertinent decisions of this Court that petitioner fails to cite, is squarely contrary to petitioner's argument. This omission is particularly telling because it fails to note that *Radovich* quotes the same language from *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940) -- upon which petitioner relies (Pet.16) -- in support of this Court's holding that a complaint challenging an input restraint in the employment market stated a Sherman Act claim. *Radovich*, 352 U.S. at 453-54 n.10.

The petition is flatly wrong when it says (Pet. 15) that there is "considerable academic debate" on this subject. Of the four articles it cites, only one[7] even addresses the argument that employer cartels should be treated more leniently than seller cartels, and that article firmly rejects petitioner's position. Other commentators agree. *E.g.*, Roberts, 70 Tulane L. Rev. at 2643 (power created by buyer cartels is "harmful overall to consumer welfare due to its effect of misallocating society's resources and thus diminishing consumer choice"); 2 Philip E. Areeda & Herbert Hovenkamp, et al., ANTITRUST LAW ¶ 377c (rev. ed. 1995). As Professor Areeda's treatise states:

> Antitrust law addresses employer conspiracies controlling employment terms precisely because they tamper with the employment market and thereby impair the opportunities of those who sell their services there. Just as antitrust law seeks to preserve the free market opportunities of buyers and sellers of goods, so also it seeks to do the same for buyers and sellers of employment services.

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[7] Stephen F. Ross, *The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws*, 1997 U. ILL. L. REV. 519, 527 (1997).

Id.

Petitioner goes so far as to suggest that the REC rule (and by extension any combination of employers to fix employees' wages) serves "the interests of consumers." Pet. 15. Commentators cited by petitioner, however, reject the notion that combinations of employers to restrain wages have any such effect. *See* 2A Philip E. Areeda, et al., ANTITRUST LAW ¶ 574, at 300 (1995); Roberts, 70 TULANE L. REV. at 2643; Ross, 1997 U. ILL. L. REV. at 527. The only "consumers" that would obviously benefit from such combinations are the employers themselves, the "consumers" of labor; and they would benefit in the way any cartel benefits — by insulating themselves from market forces. There is no public interest in allowing such combinations, and certainly none that would justify the abrupt departure from existing law that petitioner asks this Court to take in the absence of any conflict in the lower courts.

B. There Is No Conflict Regarding Application Of The Antitrust Laws To NCAA "Coaching Limitations"

There is no merit to the petitioner's contention that the Tenth Circuit's decision conflicts with the 1977 decisions of the Fifth Circuit in *Hennessey* and the Oklahoma Supreme Court in *Board of Regents of the University of Oklahoma v. NCAA*, 561 P.2d 499 (Okla. 1977) ("*Oklahoma Regents*"). For a host of reasons, no such conflict exists.

In *Hennessey* and *Oklahoma Regents*, the plaintiffs challenged the 1976 rule by which the NCAA first limited the *number* of basketball coaches member institutions could employ. Contrary to petitioner's claim (Pet. 10), no salary limitations were involved, and no effect on salaries was alleged or shown. Indeed, the Fifth Circuit's opinion in *Hennessey* noted specifically that the rule did *not* limit coaches' compensation. 564 F.2d at 1153. In *Oklahoma Regents* the NCAA argued successfully that "there is no basis for concluding that by limiting the *number* of coaches who may be employed that the *salaries* to be paid are thereby reduced." 561 P.2d at 508 (Barnes, J., dissenting, quoting the NCAA's reply brief) (emphasis added).

That argument obviously cannot be made in this case. Unlike the 1976 rule limiting the *number* of coaches, which was not

shown to affect compensation, the REC rule on its face does affect compensation (and the extent of that impact has now been established at the subsequent damages trial that is not before this Court.[8]) Thus the factual premise of the *Hennessey* and *Oklahoma Regents* decisions does not exist in this case.[9]

Those cases, moreover, are more than twenty years old, have not been followed, and have been superseded by subsequent decisions of this Court, including *NCAA v. Board of Regents*. As the court of appeals observed, with the benefit of this Court's analysis in *NCAA v. Board of Regents*, it is likely that the Fifth Circuit would reach a different result if *Hennessey* were decided now. Pet. App. 19a.

There is, in short, no conflict that this Court needs to resolve in the application of the antitrust laws to NCAA coaching restrictions (an exceedingly narrow and party-specific issue that does not warrant review). Any questions about the continued viability of the 1977 decisions of the Fifth Circuit and the Oklahoma Supreme Court either have been answered or are not presented by this case.

C. There Is No Conflict Regarding The Appropriate Application of The "Quick Look" Rule of Reason to Horizontal Price Restraints

In applying the rule of reason to the REC rule, both the district court and the court of appeals followed the road map charted by this Court in *NCAA v. Board of Regents*. Petitioner is correct in saying that anticompetitive effect must be shown, but it is incorrect in suggesting that the Tenth Circuit held otherwise, and in arguing that there was no such showing in this case. Finally, petitioner is incorrect in arguing that the court of appeals should have shown more deference to the NCAA's asserted justifications for

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[8] One of the more bizarre aspects of the petition is its suggestion (Pet. 1, 8) that the REC rule should be absolved of liability *because* it caused substantial injury.

[9] Contrary to the petition (Pet. 10), nothing in *Hennessey* or *Oklahoma Regents* suggests that those decisions turned on a distinction between buyer and seller combinations. To adopt such a distinction in *Hennessey*, the Fifth Circuit would have had to overrule *Quinonez*, 540 F.2d at 828–29, a case it did not even cite.

the REC rule. Nothing in the court of appeals' statement of the rule of reason or in its application to the facts of this case warrants review by this Court.

1. The Court of Appeals Followed Well-Settled Law In Holding That It Was Unnecessary To Define A Relevant Market And Measure Market Power Where The Anticompetitive Effect Was Both Admitted And Apparent On The Face Of The Restraint

The court of appeals held that "[a] plaintiff may establish anticompetitive effect indirectly by proving that the defendant possessed the requisite market power within a defined market *or* directly by showing actual anticompetitive effects, such as control over output or price. . . . A naked, effective restraint on market price or volume can establish anticompetitive effect under a truncated rule of reason analysis." Pet. App. 16a (emphasis added). Petitioner does not quarrel with that statement of the "quick look" rule of reason, which is in accord with all the decisions of this Court and the courts of appeals that have addressed the issue. The petition nevertheless argues that the courts below should have required a showing of market power within a defined market.

In *NCAA v. Board of Regents*, this Court rejected the NCAA's virtually identical argument:

> As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, *when there is an agreement not to compete in terms of price* or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement."

468 U.S. at 109 (emphasis added, citation omitted). The REC rule is of course just such "an agreement not to compete in terms of price."

Proof of market power is not necessary when the anticompetitive effect of a restraint is apparent on its face:

> While the "reasonableness" of a particular alleged restraint often depends on the market power of the par-

> ties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of "reasonableness." And *where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary.*

Id. at 110-11 n.42 (emphasis added). *See also FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 460 (1986) (holding market definition unnecessary to "the conclusion that the Federation unreasonably restrained trade" by agreeing to refuse requests for X-rays in connection with the processing of insurance claims).

Other courts of appeals have followed the same approach. E.g., *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1367 (3d Cir. 1996); *Chicago Prof. Sports Ltd. Partnership v. NBA*, 961 F. 2d 667, 674 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992); *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1413 (9th Cir.), *cert. denied*, 502 U.S. 994 (1991). As the Tenth Circuit held in this case, "the purpose in antitrust law of market definition . . . is not an end unto itself but rather exists to illuminate a practice's effect on competition. . . . Thus, where a practice has obvious anticompetitive effects—as does price-fixing—there is no need to prove that the defendant possesses market power." App. 17a. Similarly, as Professor Areeda has explained, market power is only "one surrogate for probable anticompetitive effects." Where the anticompetitive effects of the restraint are obvious, as they were in *NCAA v. Board of Regents*, "the defendant's denial of market power is legally irrelevant." 7 Philip E. Areeda, Antitrust Law ¶ 1511, at 433 (1986).[10]

None of the cases cited by petitioner (Pet. 19–20) holds to the contrary. The Ninth Circuit held in *California Dental Association v. FTC*, 128 F.3d 720, 730 (9th Cir. 1997), *petition for cert. filed*,

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[10] Professor Areeda's treatise endorses the decisions below as "correctly" rejecting petitioner's market power argument. Philip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ¶ 1504, at 396 n. 1 (1998 Supp.).

66 U.S.L.W. 3668 (U.S. Apr. 3, 1998) (No. 97-1625) that the "facially anticompetitive nature" of the restraint justified the finding of market power. In *In re Detroit Auto Dealers Association*, 955 F.2d 457, 470-71 (6th Cir.), *cert. denied*, 506 U.S. 973 (1992) the Sixth Circuit found sufficient "evidence of the power of petitioners in the relevant market" in the fact that they had entered into and successfully implemented an "inherently suspect" agreement to limit their hours of operation. The Eleventh Circuit in *DeLong Equipment Co. v. Washington Mills Abrasive Co.*, 887 F. 2d 1499, 1507 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990), found no violation in a case in which the "restraints [at issue] were nonprice in nature" and the plaintiff had conceded "that it has not alleged and cannot prove the facts required to establish a prima facie rule of reason case." The Second Circuit held in *Capital Imaging Associates, P.C. v. Mohawk Valley Medical Associates*, 996 F. 2d 537, 546 (2d Cir. 1993), that proof of market power is necessary only "where the plaintiff is unable to demonstrate" that the restraint has had "actual detrimental effects" on competition. And the Seventh Circuit in *Banks v. NCAA*, 977 F.2d 1081, 1088 (7th Cir.), *cert. denied*, 508 U.S. 908 (1992), stated that the rule of reason could be satisfied by proof of "anti-competitive effects."

Thus there is no disagreement among the circuits as to the law to be applied in "quick look" rule of reason cases. The plaintiff, in order to place on the defendant the "heavy burden" of justifying an anticompetitive restraint, *NCAA v. Board of Regents*, 468 U.S. at 113, must show *either* that the defendant has market power *or* that the restraint has had actual anticompetitive effects. Petitioner has no quarrel with the Tenth Circuit's recitation of this well-settled standard; its only quarrel is the contention that the Tenth Circuit erred in concluding that actual anticompetitive effects had been shown in this case. That contention is specious,[11] but in any event is confined to the facts of this case and does not warrant review by this Court. *See* S. Ct. R. 10(a).

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[11] The Tenth Circuit's conclusion is fully supported by the record. The REC rule on its face eliminates price competition, and petitioner has admitted that the rule had its intended anticompetitive effect. Pet. App. 18a. *See supra* at 2–3.

2. The Court of Appeals Followed Well-Settled Law In Rejecting The Justifications Offered By The NCAA

There is no basis in the record for petitioner's complaint that the Tenth Circuit "unduly narrowed" its opportunity to justify the REC rule by showing procompetitive benefits. Nor is there any merit to petitioner's claim that the Tenth Circuit's holding conflicts in that regard with decisions of the Seventh and Third Circuits. Those decisions, like the decision below, closely followed the analysis this Court employed in *NCAA v. Board of Regents*. Dealing with concerted action that "on its face constitutes a restraint upon the operation of a free market," these decisions place upon defendant the "heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *NCAA v. Board of Regents*, 468 U.S. at 113.

In *Chicago Professional Sports*, the Seventh Circuit held that "[u]nless there are sound justifications [for an anticompetitive combination], the court condemns the practice without ado, using the 'quick look' version of the Rule of Reason." 961 F.2d at 674. It noted that "[t]he district court proceeded in this fashion, examining the league's justifications; finding each wanting, the judge enjoined the [restraint] without defining a market." *Id.* In affirming, the Seventh Circuit considered and rejected each of the defendant's proffered justifications. *Id.* at 674–76. In *United States v. Brown University*, 5 F.3d 658, 672-78 (3d Cir. 1993), the Third Circuit followed the same analysis, concluding however that the justifications proffered in that case were sufficient to require the district court to "more fully investigate [them] than it did when it performed the truncated rule of reason analysis." *Id.* at 678. Those courts all applied the rule of reason in the identical fashion that the Tenth Circuit employed in this case (the difference in the outcome in *Brown University* flows from the particular facts of record in that case, not from a difference in the legal standard applied). Pet. App. 20a–26a. Other circuits are in accord. *California Dental Ass'n*, 128 F.3d at 728; *Clorox Co. v. Sterling Winthrop, Inc.* 117 F.3d 50, 59 (2d Cir. 1997).

None of the authority cited by petitioner supports its claim that a defendant need only "articulate" or "assert" some arguably procompetitive justification. Nor can that claim be squared with *NCAA v. Board of Regents*, in which this Court considered "[t]he interest in maintaining a competitive balance that is *asserted* by the NCAA as a justification for [the restraint]," 468 U.S. at 118 (emphasis added), and rejected that "assert[ion]" as unsupported by the factual record. *Id.* at 119–20. That is what the Tenth Circuit did here.

The Tenth Circuit also hewed closely to *NCAA v. Board of Regents* in drawing the line between horizontal restraints that are "essential if the [NCAA's] product is to be available at all" (468 U.S. at 101) -- such as "rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture" (*id.* at 117) -- and those that are not. The REC rule's restraints on assistant coaches' compensation, like the television restraints in *NCAA v. Board of Regents*, "do not . . . fit into the same mold" as restraints necessary to the production of college sports. *Id.*

Petitioner did not even argue in the district court that the REC rule was procompetitive. To the contrary, it attempted to justify the rule by pointing to its anticompetitive effect. *See, e.g.*, NCAA C.A. App. 111–12 (explaining that the rule was justified as an attempt to prevent member institutions from "keeping up with the Joneses" by paying competitive salaries). As in *National Society of Professional Engineers v. United States*, 435 U.S. 679, 693 (1978), petitioner's "affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement." This Court "has never accepted [the] argument" that a "restraint on price competition ultimately inures to the public benefit." *Id.* at 693–94.

There is no principled basis for petitioner's central premise that if it is desirable to encourage entry-level coaches it therefore must be lawful to fix their salaries. If that argument had merit, it might as well be argued that the members of the NCAA (or the American Council on Education) may collectively agree to cap the salaries of assistant professors in order to encourage "entry-level"

academicians. Even if -- contrary to rock solid antitrust doctrine -- competition for coaches (or professors) could somehow be regarded as a bad thing, "the elimination of so-called competitive evils in an industry is nō legal justification for price-fixing agreements." *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 349 (1982) (internal brackets and quotation marks omitted).

III. THE DECISION BELOW DEALS ONLY WITH HORIZONTAL PRICE FIXING IN A COMMERCIAL EMPLOYMENT MARKET, AND DOES NOT THREATEN LEGITIMATE NCAA REGULATION OF INTERCOLLEGIATE ATHLETICS

In an attempt to infuse its request for certiorari with artificially inflated significance, petitioner characterizes the issues presented as "exceptionally important" (Pet. 27), and the decision below as threatening "the future of competitive intercollegiate athletics." *Id.* at 29. In fact, the decision below addresses only the indisputably legitimate concern of the antitrust laws, the preservation of competition in our economy. Nothing in the Tenth Circuit opinion makes it more difficult for petitioner to defend legitimate regulation of intercollegiate athletics.

1. Despite petitioner's breathless citation of news media and commentary regarding the case,[12] petitioner continues to enjoy wide latitude in regulating intercollegiate athletics. This case involves only price fixing of employee salaries. It does not involve limitations on the number of coaches. It does not involve athletic scholarships. Pet. 28. It does not involve the number of games schools can play. *Id.* And it has nothing whatever to do with amateurism for student-athletes. The NCAA existed and thrived for nearly 90 years without the REC rule. It has continued to operate since the rule's rescission without noticeable ill effects.

Petitioner may in the future, as it has in the past, be called upon to defend other of its rules against challenges under the anti-

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[12] That the NCAA seeks and attracts a great deal of press attention does not, of course, make the legal issues in this case any more important or difficult. A party's prominence or notoriety should not and does not play any role in this Court's exercise of its discretionary certiorari jurisdiction.

trust laws. Such rules can and should be evaluated on their merits and measured against well established principles of antitrust law, in particular this Court's decision in *NCAA v. Board of Regents*. That case provides a clear road map for the evaluation of petitioner's regulations and was faithfully followed by the court of appeals in this case.

There is no basis, moreover, for the implication that respondents do not value the tradition of intercollegiate athletics or do not appreciate petitioner's role in the preservation and encouragement of that tradition. Pet. 29. Respondents are individuals who have dedicated their careers to coaching student athletes, and who embody the best of the intercollegiate athletic tradition. That petitioner -- an organization whose revenues increased more than five-fold in 10 years[13] -- descends to the level of such baseless aspersions in these circumstances exposes the absence of any serious ground for review.

Contrary to petitioner's argument, this is a simple and straightforward case on the issue of liability. The supposed "drastic fiscal consequences" of the NCAA's price-fixing (Pet. 8) are neither relevant to that issue nor a valid basis for seeking this Court's review. There is no principled argument that the federal courts should refrain from dropping a penalty flag when petitioner has so obviously committed an economic foul, simply for fear of being accused of threatening the future of intercollegiate athletics.

2. It is similarly unavailing for petitioner to assert that this Court should utilize this case to "bring greater clarity and certainty" to "quick look" rule of reason analysis. Pet. 30. Whether or not further elucidation of that subject is appropriate, this interlocutory appeal is not a suitable vehicle for it. The courts below were presented with a naked restraint in the form of an agreement among competitors to fix the price of coaching services. "No antitrust offense is more pernicious than price fixing." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 639 (1992). That the price fixing in this case directly affects people's livelihood certainly makes it no

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[13] Petitioner's annual revenues increased from $51 million in 1987-88 to $270 million in 1997-98. *Money Games Inside the NCAA*, Kansas City Star, Oct. 5, 1997, at A1.

less pernicious. By considering petitioner's proffered justifications for the REC rule, rather than treating it as a *per se* violation of the Sherman Act, the courts below arguably gave it more leeway than it deserved.[14] That factor alone makes this case *sui generis* and an inappropriate vehicle for further development of the "quick look" rule of reason. There is nothing untoward or revolutionary about the manner in which the issue was addressed, and nothing remarkable about the conclusion of the courts below.[15]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1998

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[14] Indeed, the record in this case would require this Court first to consider application of the *per se* standard, thereby creating the distinct possibility that the question presented in the petition might never be reached. That consideration weighs heavily against certiorari.

[15] Petitioner's home-grown *amicus* support, far from demonstrating that the decision below has importance beyond the facts of this case, actually shows the opposite. Only intercollegiate athletic conferences and the American Council on Education, which are composed largely if not entirely of NCAA members (the colluding employers in this case) have expressed an interest.

Supreme Court, U.S.
FILED
AUG 7 1998
CLERK

No. 97-2004

In The

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Petitioner*

v.

NORMAN LAW, ANDREW GREER, PETER HERRMANN, MICHAEL JARVIS, JR., CHARLES M. RIEB, DOUG SCHREIBER, LAZARO COLLAZO, ROBIN DREIZLER, AND FRANK CRUZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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BRIEF *AMICUS CURIAE* OF THE AMERICAN COUNCIL ON EDUCATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Council on Education ("ACE") submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by the National Collegiate Athletic Association ("NCAA"). This brief is filed with the written consent of all parties, and their letters of consent have been filed with the Court.[1/]

INTEREST OF THE *AMICUS CURIAE*

ACE is a nonprofit national educational association whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. Since its founding in 1918, ACE has sought to promote the highest standards in all aspects of post-secondary education. As a leading participant in higher education affairs, ACE seeks to advance the interests of all members of the academic community — students, faculty, staff and educational institutions themselves. ACE is dedicated to the principle that a strong higher education system is a cornerstone of a democratic society.

ACE participates as an *amicus curiae* only on rare occasions when a case presents an issue of importance to our nation's system of higher education. This is such a case.

The court below in *Law v. National Collegiate Athletic Association*, 134 F.3d 1010 (10th Cir. 1998) (Pet. App. at 1a-26a), misapplied the federal antitrust laws. In the absence of any evidence of restraints on prices or output affecting

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1/ Only counsel for the *amicus curiae* wrote this brief. No person or entity, other than the *amicus curiae* and its members, made a monetary contribution to the preparation or submission of this brief.

consumers, the Tenth Circuit forbade more than 300 colleges and universities from implementing a rule that is designed to foster amateurism in Division I basketball competition, to encourage creation of new entry-level coaching positions, and to control the rising costs of men's intercollegiate basketball programs. After the Tenth Circuit refused to consider these justifications for the challenged rule and issued its opinion, the district court imposed trebled damages of some $67 million that will heavily burden nonprofit colleges and universities. Beyond the monetary burden, the Tenth Circuit's decision affects the nation's colleges and universities in three important respects:

First, the decision has the perverse effect of requiring nonprofit institutions pursuing noncommercial goals to justify challenged actions that have not harmed consumers solely by reference to the kind of competitive economic objectives that motivate for-profit entities.

Second, by treating college amateur athletics purely as a for-profit business that may be "restrained" only by those agreements that promote the business aspects of intercollegiate athletics, the decision makes NCAA Division I sports a commercial enterprise that is beyond the control of the schools that created it. The decision below curtails the schools' ability to resist the constant pressures toward professionalism and win-at-any-cost spending that subordinates educational objectives to commercial values.

Third, the decision's requirement that the NCAA "prove" each "restraint" is "necessary" to the survival of college athletics will encourage adversely affected teams or athletes to contest heretofore accepted rules regarding academic standards, scholarship limitations, and other eligibility matters.

SUMMARY OF *AMICUS'S* POSITION

The "restricted earnings coach" rule ("REC Rule") at issue in this case limits the coaching staff of Division I men's basketball teams to a head coach, two assistants, and a "restricted earnings coach" with a capped compensation level of $16,000. It is the latest in a long series of coaching and other regulations by which colleges and universities have sought, through the NCAA, to harmonize the rules of intercollegiate sports competition with the goals of amateurism, competitive balance among teams, and the larger educational mission of higher education. The REC Rule was adopted after a careful study recommended a package of regulations designed to promote competitive balance on the basketball court, preserve opportunities for entry-level student coaches, and curb overspending on athletic programs at the expense of academic and other activities.

The court of appeals summarily rejected all justifications offered for the REC Rule on the view that it was so "obviously anticompetitive" that it should be condemned under a "quick-look" rule-of-reason analysis. In so ruling, the Tenth Circuit departed from previously applied antitrust principles in two key respects:

1. Most broadly, the court of appeals did not follow the accepted precept that, because higher education institutions are not for-profit businesses acting with commercial motives, the NCAA deserved an opportunity to defend the challenged restrictions in a full-fledged trial under the rule-of-reason standard. The Tenth Circuit's refusal to consider any non-economic justification for the REC Rule departed from many decisions in which courts have weighed such factors where there is no evidence of any price or output restraint harming consumers. In these circumstances, the decision below

conflicts with *United States v. Brown University*, 5 F.3d 658, 678 (3d Cir. 1993):

> "[A] full rule of reason analysis is in order here. It may be that institutions of higher education 'require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.' *Goldfarb v. Virginia*, 421 U.S. 773, 778 n.17 (1975). *See also Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 213 n.7 (1959) ('[t]he Act is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations . . . which normally have other objectives')."

2. More narrowly, the court of appeals' "quick-look" analysis condemned rules that do not materially differ from coaching and similar regulations that have been upheld under a plenary rule-of-reason analysis. *Hennessey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977); *Board of Regents of the University of Oklahoma v. NCAA*, 561 P.2d 499 (Okla. 1977) ("*Board of Regents*").

ACE accordingly urges this Court to grant certiorari and address the Tenth Circuit's departure from previously accepted principles. These questions deserve review because, where there is no evidence of any output or price restraint affecting consumers, the nation's nonprofit colleges and universities (1) must be able to present a full rule-of-reason defense against antitrust claims by offering evidence bearing on the special characteristics and objectives that set them apart from purely commercial enterprises, and (2) should not be punished by large treble damages awards under an unprecedented antitrust analysis that rejects earlier decisions upholding rules that are not materially different from those challenged here.

STATEMENT

ACE adopts the statement of the case presented in NCAA's petition filed on June 11, 1998. Here we focus on matters showing why the Tenth Circuit's decision, if allowed to stand, would unduly restrict the ability of the nation's colleges and universities to accomplish their broad educational mission, of which athletic programs are only a part.

The NCAA is an unincorporated, nonprofit association of more than 1,100 colleges and universities engaged in intercollegiate athletic competition. It was established "to maintain intercollegiate athletics as an integral part of the educational program," the essential attribute that differentiates intercollegiate athletics from professional sports. *NCAA v. Tarkanian*, 488 U.S. 179, 183 (1988) (internal quotation marks omitted). To preserve the special character of amateur athletics, and to subordinate intercollegiate athletic programs to the broader educational goals of colleges and universities, NCAA rules impose standards of academic eligibility and amateurism (including strict limits on student-athlete compensation), regulate recruiting, limit coaching staffs and team rosters, and prescribe many other guidelines.

The NCAA schools have long regulated expenditures on athletic programs in order to preserve competitive equity and "to reorient the athletic programs into their more traditional role as amateur sports operating as a part of the educational process." *See Board of Regents*, 561 P.2d at 507. Such limitations — including restrictions on the number of coaches an intercollegiate team may employ — have previously survived antitrust challenge. *See Hennessey v. NCAA*, 564 F.2d at 1154; *Board of Regents*, 561 P.2d 499.

During the 1980s, colleges and universities began to address the sharply rising costs of intercollegiate athletic

programs, a problem that was compounded by the need to reallocate financial support between men's and women's athletic programs in order to comply with Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681(a). (Pet. App. at 2a-3a.) About 42% of Division I NCAA member schools were incurring deficits in their athletic programs, averaging more than $800,000 per school. (*Id.* at 3a.) The focus on athletic competition and professionalism was overshadowing educational objectives and activities: some schools "had to close academic departments, fire tenured faculty, and reduce the number of sports offered to students." (*Id.*)

Accordingly, the NCAA established a Cost Reduction Committee ("CRC") to study ways of containing athletic program costs in a manner that would maintain competitive balance among Division I college teams and preserve student-athletes' access to higher education. (*Id.* at 4a.) The CRC included financial aid personnel, athletic administrators, college presidents, university faculty, and a university chancellor. (*Id.*)

The CRC recommended a number of economies and other measures that were adopted by the schools and that are not challenged here.[2/] The CRC also suggested reducing Division I basketball coaching positions to three, which was opposed by the National Association of Basketball Coaches on the ground that it would discourage the hiring of apprentice-level coaches, particularly students seeking graduate degrees

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[2/] Measures that were adopted regulated the number of coaches who could recruit off campus, off-campus contacts with prospective student-athletes, printed recruiting materials, the number of practices before scheduled games, the number of games and duration of seasons, team travel and training table meals, and financial aid grants to student athletes. (Pet. App. at 7a n.5.)

in physical education. (Pet. at 4.) To address this problem, the CRC proposed and the NCAA Division I schools adopted a modified proposal that became the REC Rule. It limited basketball coaching positions to three, while allowing schools to employ a fourth restricted earnings coach ("REC") whose coaching compensation was limited to $16,000 per year (although REC's could take other *bona fide* paying jobs at their colleges or elsewhere). (Pet. at 4-5.) The compensation cap was patterned on the average grant-in-aid for graduate student teaching assistants. (*Id.*)

Soon after the REC Rule took effect, five basketball coaches filed a class action alleging that the REC Rule limited their compensation in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Tenth Circuit affirmed the district court's grant of summary judgment to the plaintiffs based on a "quick-look" rule-of-reason analysis of the REC Rule.

REASONS FOR GRANTING THE WRIT

THE TENTH CIRCUIT DEPARTED FROM ESTABLISHED PRACTICE IN CASES INVOLVING NONPROFIT ACADEMIC OR PROFESSIONAL ASSOCIATIONS BY REFUSING TO CONSIDER JUSTIFICATIONS FOR THE REC RULE UNDER A FULL RULE OF REASON ANALYSIS.

The Tenth Circuit held that the NCAA was not entitled to a trial on the merits because, in that court's view, the REC Rule was a "naked horizontal agreement among competitive purchasers to fix prices." (Pet. App. at 11a.) It found that the practice was "so obviously anticompetitive" that it was unnecessary even to identify a relevant market, determine whether NCAA exercised any market power, or evaluate resulting anticompetitive effects. (*Id.* at 18a.) The court said that the only legitimate justifications for the REC Rule would

be those proved to be "necessary to produce competitive intercollegiate sports" (*id.* at 20a), and that the schools' noneconomic values or goals could not be considered in judging the reasonableness of the rule.

Such a truncated review of practices challenged under the Sherman Act is the exception, rather than the rule. *State Oil Co. v. Kahn*, 118 S. Ct. 275, 279 (1997). NCAA's petition shows that, even under antitrust law standards applied to for-profit businesses pursuing purely commercial objectives, the Tenth Circuit's application of the "quick-look" standard fails to appreciate the important distinctions between improper *output* restrictions and permissible cooperation in a joint enterprise. (Pet. at 12-17.) Here, ACE addresses an equally important defect: the Tenth Circuit's failure to recognize and apply the standards customarily employed where challenged restraints are imposed by nonprofit entities pursuing noncommercial objectives.

A. The Tenth Circuit Departed From Established Practice By Condemning The Practices Of Nonprofit Educational Institutions Without Engaging In A Full Rule Of Reason Analysis.

By refusing to engage in a full rule-of-reason analysis, the Tenth Circuit departed from a long line of decisions that are discussed and applied in the Third Circuit's decision in *United States v. Brown University*, 5 F.3d 658. In *Brown University*, the district court applied a truncated "quick-look" rule of reason analysis to condemn "what it believed was a plainly anticompetitive agreement" among a group of universities that had imposed need-based restrictions on financial assistance that could be awarded to matriculating students. 5 F.3d at 664. The district court rejected as impermissible "social welfare justifications" the schools' defense that the financial assistance rules preserved their financial ability to offer "need-

blind admissions" to prospective students, which fostered educational diversity by admitting students from all walks of life without regard to their ability to pay steep private college tuitions. *Id.*

The Third Circuit reversed, finding that "a full rule of reason analysis is in order here." *Id.* at 678. It remanded the case with instructions that the district court should "more fully investigate the procompetitive and noneconomic justifications proffered by [the University] than it did when it performed the truncated rule of reason analysis." *Id.* The Third Circuit ruled as it did for three reasons that are equally applicable in this case.

First, on the broadest level, the Third Circuit in *Brown University* drew from this Court's decisions the principle that antitrust challenges to nonprofit entities pursuing noncommercial goals warrant careful consideration under a plenary rule-of-reason review, because "it may be that institutions of higher education 'require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently.'" *Id.* (quoting *Goldfarb v. Virginia*, 421 U.S. at 788 n.17). This reflects the principle that the Sherman Act should be "applied only to a very limited extent to organizations . . . which normally have [noncommercial] objectives." *Klor's Inc.*, 359 U.S. at 213 n.7. Other courts of appeals have applied the same principle in antitrust cases challenging the conduct of colleges and universities.[3/] The Tenth Circuit ignored this

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[3/] *See, e.g., Marjorie Webster Junior College, Inc. v. Middle States Association of Colleges & Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.) ("[T]he proscriptions of the Sherman Act were 'tailored* * *for the business world,' not for the noncommercial aspects of the liberal arts and the learned professions") (footnote omitted), *cert. denied*, 400

(continued...)

principle and gave inadequate consideration to the nonprofit status and noncommercial goals of the NCAA members.

Second, the Third Circuit in *Brown University* stressed that, unlike the situation posed by the NCAA television broadcast restrictions in *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 113 (1984), there was no showing that the challenged financial assistance rules were harming consumers by restricting output or raising prices.[4/] The Third Circuit observed that "the absence of any finding of adverse effects such as higher price or lower output is relevant" in considering the justifications for the financial assistance rules. *Id.* Here there was no evidence that the REC Rule had harmed consumers by affecting the output or price of intercollegiate basketball. Instead, the Tenth Circuit seized on a single ancillary effect of the REC Rule: the complaints of *coaches* who contended that the compensation restrictions reduced their pay. (Pet. App. at 17a-18a.) Instead of condemning the REC Rule based entirely on its supposed effect on the compensation levels of affected coaches, the Tenth Circuit should at least have remanded the case — as the Third Circuit did in *Brown University* — for careful weighing of the schools' goals and objectives against any ancillary impact on plaintiffs. A proper analysis would

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[3/](...continued)
U.S. 965 (1970). *See also Donnelly v. Boston College*, 558 F.2d 634, 635 (1st Cir.), *cert denied*, 434 U.S. 987 (1977); *Selman v. Harvard Medical School*, 494 F. Supp. 603, 621 (S.D.N.Y.), *aff'd*, 636 F.2d 1204 (2d Cir. 1980).

[4/] Specifically, the Third Circuit found no evidence suggesting that the financial assistance rule "caused or is even likely to cause any reduction of output," and observed that the district court had "assumed without deciding that the cooperation among the schools had no aggregate effect on the price of [higher] education." 5 F.3d at 674.

also have considered the evidence showing that the affected coaching positions account for a *de minimis* proportion of the coaching positions for which plaintiffs might qualify. (*See* Pet. at 21-22.) As NCAA's petition correctly observes, the Tenth Circuit likewise disregarded the principle in rule-of-reason cases that joint input restrictions often benefit consumers and must accordingly be judged under standards different from those applied to output restrictions. (Pet. at 12-17.)

Third, the Third Circuit in *Brown University* properly recognized that nonprofit academic institutions pursuing noncommercial goals should not be required to justify challenged actions solely by reference to the kind of competitive, economic objectives that motivate for-profit businesses. Nonprofit charitable and eleemosynary institutions exist to provide services and achieve social goals that are largely unavailable from for-profit businesses; it is perverse to require nonprofits to defend their conduct by reference to the motives of the commercial marketplace. From this perspective, the Third Circuit in *Brown University* held that "alleged social welfare values" inherent in encouraging a diverse student body should be considered in determining the reasonableness of the financial assistance rules. 5 F.3d at 676. Here, by contrast, the Tenth Circuit rejected all justifications save those economic and competitive "rationales . . . necessary to produce competitive intercollegiate sports." (Pet. App. at 20a.) This ignores the noncommercial educational goals of intercollegiate athletic programs that are entirely distinct from the desire to create a commercial product. Amateur athletics also exist to encourage the development of scholar athletes within the larger academic community.

In reaching their conflicting conclusions, both the Third Circuit and Tenth Circuit relied on three of this Court's

decisions holding that the Sherman Act redresses consumer injury caused by commercially-motivated professionals acting through associations to impose price or output restrictions. The Third Circuit's analysis correctly reads the three decisions as applying to such particular circumstances; the Tenth Circuit misreads them as establishing a broad ban on considering any noneconomic justification in the context of any rule-of-reason analysis.[5/] In the absence of any price or output restraints harming consumers, the new rule announced by the Tenth Circuit cannot be justified by precedent or logic.

B. The Tenth Circuit's Decision Effectively Requires That Intercollegiate Athletic Programs Be Operated As For-Profit Businesses.

The Third Circuit in *Brown University* held that a full rule-of-reason analysis should be conducted upon a showing that the challenged restrictions were "reasonably necessary to [a university's] institutional purpose." 5 F.3d at 674. *See*

[5/] The Third Circuit in *Brown University* distinguished this Court's decisions in *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990); *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); and *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). In each case, this Court was expressly mindful of the fact that the defendants were organizations of for-profit businesses or professionals who pursued their commercial advantage through competitive price or output restrictions that they tried to defend with high-sounding justifications of dubious sincerity. 5 F.3d at 677-78.

Oblivious to the three cases' real import, the Tenth Circuit erroneously reads them as declaring that "we may not consider such [noneconomic goals and] values unless they impact upon [*i.e.*, promote] competition." (Pet. App. at 20a.) This Court has never adopted the broad principle applied by the Tenth Circuit: namely, that the noneconomic goals and institutional mission of nonprofit entities may not be considered in a rule of reason analysis.

also Chicago Prof. Sports Partnership v. National Basketball Association., 961 F.2d 667, 674 (7th Cir.), *cert. denied*, 506 U.S. 954 (1992). But the Tenth Circuit upheld summary judgment against NCAA because it had failed to *prove* that the REC Rule succeeded in "increasing output, creating operational efficiencies, making a new product available, enhancing product or service quality, and widening customer choice." (Pet. App. at 22a.) This approach not only denies NCAA the plenary rule-of-reason review conducted in *Brown University* and other cases, but it also treats all aspects of intercollegiate sports purely as a for-profit business that may be "restrained" only by those agreements designed to promote the business success of athletics. Such a rule might make sense in a case involving restraints on output or price affecting consumers, such as this Court's decision striking down price fixing/output restrictions on for-profit television broadcasting of college football games in *NCAA v. Board of Regents*, 468 U.S. 85. But it is a perverse and unprecedented principle when applied in the context of restraints such as the REC Rule, which does not restrain any product market.

Thus, the Tenth Circuit's sweeping and indiscriminate standard — and the heavy burden of proof imposed on schools — casts doubt on many NCAA rules, including rules that have been upheld by other courts. Although it attempts to distinguish its holding here, the Tenth Circuit's reasoning logically would condemn a rule limiting the number of coaches on a team, which is precisely the "restraint" that was upheld after a full rule-of-reason analysis in *Hennessey v. NCAA*, 564 F.2d 1136, and *Board of Regents*, 561 P.2d 499. And if coaches can use the new Tenth Circuit standard to challenge the REC Rule on the ground that it is not absolutely necessary to the success of intercollegiate sports, there is no principled reason why adversely affected teams or athletes should not be able to contest whether heretofore accepted academic standards, scholarship limitations, and other

eligibility rules meet that stringent standard.[6/] The Tenth Circuit's decision, in sum, puts the NCAA and its member schools at grave risk because rules adopted in good faith to promote amateurism and competitive balance, and which do not hurt consumers by restricting output or fixing prices, may nevertheless be the source of litigation and large treble damage awards.

In addition to promoting competitive balance and amateurism, the REC Rule sought to advance the educational goal of preserving coaching positions for physical education graduate students and other neophytes at compensation levels established by reference to graduate teaching fellowships. The Tenth Circuit granted that "opening up coaching positions for younger people may have social value apart from its effect on competition," but rejected the justification as an appeal to illegitimate noneconomic factors. (Pet. App. at 20a.) Having focused exclusively on free market economic principles, the Tenth Circuit scorned the REC Rule as violating the social Darwinism precept against "sav[ing] inefficient or unsuccessful competitors from failure." (*Id.* at 24a.) It should be clear from this and the many similar observations in the decision below that the Tenth Circuit equated intercollegiate basketball teams with for-profit business

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[6/] *See, e.g., Smith v. NCAA*, 139 F.3d 180 (3d Cir. 1998) (upholding NCAA bylaw prohibiting a student-athlete from participating in intercollegiate athletics at a postgraduate institution other than the institution from which she received her undergraduate degree) (*petition for cert. filed* July 16, 1998); *Banks v. NCAA*, 977 F.2d 1081 (7th Cir. 1992) (upholding NCAA eligibility requirements including the no-agent and no-draft rules), *cert. denied* 508 U.S. 908 (1993); *McCormack v. NCAA*, 845 F.2d 1338 (5th Cir. 1988) (upholding limits on compensation to student athletes); *College Athletic Placement Service v. NCAA*, 1975-1 Trade Cas. (CCH) ¶ 60,117 (D.N.J.), *aff'd* 506 F.2d 1050 (3d Cir. 1974) (upholding NCAA rule prohibiting student-athletes from hiring professional business agents).

competitors, rather than treating them as amateur participants in a joint enterprise among nonprofit educational institutions. While the NCAA member schools surely have certain commercial goals for their sports programs — to earn revenues covering their costs and perhaps more — they also have noncommercial, educational goals that differentiate them from for-profit sports leagues. Although this case did not involve any effort to impose price and output restraints harmful to consumers of college basketball, the Tenth Circuit rejected noneconomic justifications as if they were offered in support of such restraints.

The Tenth Circuit also missed the broader point that should also have been considered under a full rule-of-reason analysis: namely, intercollegiate athletics is only one narrow aspect of the larger product that is actually created by the NCAA members — a college education. Through the joint cooperation required to create intercollegiate athletics, schools must impose restraints designed to preserve the goals of amateurism, foster scholar-athletes, and curb the constant pressures toward professionalism, commercialization and win-at-any-cost spending that threatens to undermine academic values. *See Board of Regents*, 561 P.2d at 507 (NCAA rules legitimately seek to "reorient the athletic programs into their more traditional role as amateur sports operating as a part of the educational process"); *Hennessey*, 564 F.2d at 1153 (same); *College Athletic Placement Service v. NCAA*, 1975-1 Trade Cas. (CCH) ¶ 60,117 at 65,267. It is not easy to resist the commercial pressures of big-time athletics, but fighting to preserve a balance is essential to the institutional mission of colleges and universities. Moreover, exercising control over the costs of men's intercollegiate basketball enables schools to husband their resources for other athletic and academic programs demanded by the actual consumers for whose welfare the REC Rule was adopted — the students who attend the NCAA Division I colleges and universities. A proper rule

of reason analysis would have considered the welfare of student consumers in evaluating the reasonableness of the REC Rule.

In sum, the Tenth Circuit lost sight of the fundamental point: the Sherman Act aims at "prevention of restraints to free competition in business and commercial transactions which ten[d] to restrict production, raise prices, or otherwise control the market." *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940). That is not this case. Nothing in the antitrust laws or decisions construing them supports the Tenth Circuit's misconception that, once college and universities create intercollegiate sports, they must be compelled forever to take only those actions that will promote and expand the commercial scale and success of the endeavor. The decision below turns the Sherman Act upside down by transforming it from a regulation of restraints on trade or commerce into a rule that nonprofit institutions must behave as if they are commercial businesses wherever their collective noncommercial activities may have incidental economic effects.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1997

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION,

Petitioner,

v.

NORMAN LAW, ANDREW GREER, PETER HERRMANN, MICHAEL JARVIS, JR., CHARLES M. RIEB, DOUG SCHREIBER, LAZARO COLLAZO, ROBIN D. REIZLER, AND FRANK CRUZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF AMICI CURIAE AMERICA EAST CONFERENCE, THE BIG TWELVE CONFERENCE, INC., BIG SKY CONFERENCE, INC., ATLANTIC COAST CONFERENCE, THE BIG TEN CONFERENCE, INC., CONFERENCE USA, METRO ATLANTIC ATHLETIC CONFERENCE, MID-CONTINENT CONFERENCE, NORTHEAST CONFERENCE, PACIFIC-10 CONFERENCE, SOUTHLAND CONFERENCE AND WEST COAST CONFERENCE IN SUPPORT OF NATIONAL COLLEGIATE ATHLETIC ASSOCIATION

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INTEREST OF AMICI

Amici are a group of college athletic conferences known as America East Conference, The Big 12 Conference, Inc., The Big Sky Conference, Inc., The Big Ten Conference, Inc., Conference USA, Metro Atlantic Athletic Conference, Association of Mid-Continent Universities (also known as the Mid-Continent Conference), Northeast Conference, Southland Conference, Pacific-10 Conference, Atlantic Coast Conference, and West Coast Conference. Like the NCAA, Amici organize and establish rules and standards that govern the athletic contests between their respective member institutions. Each conference's rules and regulations are designed to ensure that student athletics are available to all students and that athletic competition among conference member institutions is conducted in accordance with the educational goals of the universities and colleges belonging to the conference. The decisions below of the Tenth Circuit and the district court raise important issues for amici which can only be resolved if the petition for writ of certiorari is granted.[1]

SUMMARY OF ARGUMENT

The decisions below adopt an unsupported method for analyzing under the Sherman Act the lawfulness of rules and regulations established by intercollegiate athletic organizations. This Court has previously ruled that, with regard to such organizations, cooperation by the member institutions belonging to these organizations is necessary for the product of amateur intercollegiate athletics to exist at all and that, in evaluating what in other

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[1] In compliance with Supreme Court Rule 37.6, amici state that no part of this brief was authored by any party or its counsel. Monetary support for this brief came exclusively from the amici on whose behalf the brief is filed.

contexts would be horizontal agreements and *per se* violative of the Sherman Act, the courts must employ a Rule of Reason analysis. *NCAA v. Board of Regents*, 468 U.S. 85, 99-103 (1984). Except in the Tenth Circuit, the courts have remained faithful to this ruling. In the decisions below, however, the trial court and the Court of Appeals engaged in a misguided application of the Rule of Reason that did not adequately take into account the need for intercollegiate athletic organizations to control inputs into intercollegiate athletics and failed to appreciate the economic differences between agreements to restrict inputs and agreements to restrict output. The courts below found without any market analysis that there were anticompetitive effects from the restriction at issue, placed a heavy burden on the NCAA to show the procompetitive effects of the restriction, and then rejected the NCAA's justifications without adequately evaluating the need for the restriction. Moreover, the courts below failed to understand that intercollegiate athletic organizations are democratic in nature.

The decisions below impact amici in several ways. First, the Tenth Circuit decision threatens the ability of amici and other intercollegiate athletic organizations to regulate athletics in a way that is consistent with the educational objectives of their member institutions.[2]

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[2] All of the member institutions of amici are also members of the NCAA. Like the NCAA, each of the amici has established rules and standards that govern the athletic competitions that they organize. The NCAA establishes minimum standards and rules for collegiate athletics. In most instances, a collegiate athletic conference will establish rules and standards for its members because the NCAA standards and rules are not sufficient to meet the educational goals of the member institutions of the conference. Consequently, these conference standards and rules are often more restrictive than those of the NCAA.

Absent an ability to regulate the inputs that go into intercollegiate athletics,[3] some educational institutions may need to drop certain sports programs that are not financially self-sustaining. Moreover, in the long-run, if the costs of inputs into intercollegiate sports programs cannot be controlled to reduce informational costs of scheduling – the cost of locating opponents that will offer exciting, competitive match-ups – and to ensure that particular sports programs remain true to the educational objectives of each of the member institutions of amici and the NCAA, colleges and universities may sharply curtail programs. Finally, because the decisions below created a split in the Courts of Appeals regarding the evaluation of input restrictions implemented by intercollegiate organizations, the decisions threaten the competitiveness of intercollegiate athletic conferences that have as members colleges and universities located within the Tenth Circuit.[4] Indeed, the split of authority created by the decisions below may threaten the future of these conferences: colleges and universities that are members of these conferences but are not themselves located within the Tenth Circuit may withdraw from the conferences in order to maximize their ability to regulate their intercollegiate sports programs and to minimize their legal liability from regulations adopted for this purpose. For these reasons,

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[3] Among the key inputs that go into intercollegiate sports are student-athletes and coaches. Rules on academic eligibility and limits on team size serve to restrict the former input by limiting the number of student athletes that can participate in intercollegiate sports. Rules restricting the number of coaches and limiting compensation paid for coaches can restrict the latter input.

[4] Among the conferences with member institutions located in the Tenth Circuit are the Big Twelve Conference, the Big Sky Conference, and the Western Athletic Conference.

amici entreat the Court to grant the NCAA's petition for a writ of certiorari, to resolve the conflict among the Circuits, and to reverse the decision by the Court of Appeals for the Tenth Circuit below.

ARGUMENT

I. THE DECISION OF THE TENTH CIRCUIT GRAVELY THREATENS THE OPERATIONS OF INTERCOLLEGIATE ATHLETIC ORGANIZATIONS BECAUSE IT FAILS TO TAKE INTO CONSIDERATION THE ECONOMIC REALITIES OF INTERCOLLEGIATE ATHLETICS.

Unless a restriction falls into the categories of restraints that are *per se* illegal – and there is no question here that the *per se* label should not apply to the restraint at issue below[5] – it is important that a court evaluating a restriction under Section 1 of the Sherman Act understand the economic context in which the restraint has been imposed. Indeed, in formulating the contours of the Rule of Reason analysis, this Court held:

> To determine [the reasonableness of a restraint] the court must ordinarily consider the facts peculiar to the business to which the restraint was applied; its condition before and after the restraint was imposed; [and] the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the remedy, the purpose or end sought to be attained, are all relevant facts.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918). As more fully discussed below, the Court of

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[5] *See NCAA v. Board of Regents of University of Oklahoma*, 468 U.S. 85, 101 (1984).

Appeals below made no effort to evaluate the economic context of intercollegiate athletics because of the unsupported method it employed for conducting a Rule of Reason analysis in the context of intercollegiate athletics.

The Tenth Circuit completely ignored the economic realities that face the NCAA and amici. For example, the plaintiffs were spared from having to prove any adverse economic impact on consumer welfare arising from the restriction. In turn, the NCAA's justifications for the restriction were rejected without any consideration of the economic realities that it confronts. As a result, the decision below threatens the future of intercollegiate athletics. Unless the Court grants the petition for certiorari and considers the issues surrounding the restriction in light of market realities, every subsequent restraint imposed by the NCAA or amici to regulate inter-collegiate athletics may be scrutinized, especially by courts in the Tenth Circuit, for lawfulness under the antitrust laws pursuant to an analytic framework that assumes economic harm resulting from the restraint and discounts the economic benefits flowing from the restraint simply because the court can hypothesize what it deems to be a more effective method of accomplishing the goals of the regulating body.

Under the Rule of Reason, the plaintiff bears the burden of proof to demonstrate that the restraint is unreasonable. *United States v. Arnold Schwinn & Co.*, 388 U.S. 365, 374 n. 5 (1967); *Standard Oil Co. v. United States*, 283 U.S. 163, 179 (1931). Here, the Court of Appeals effectively failed to leave the burden of persuasion with the plaintiff. Its stated rationale for doing so was this Court's prior holding that *per se* analysis of horizontal restraints imposed by intercollegiate sports organizations is inappropriate because intercollegiate sports "involves an industry in which horizontal restraints on competition

are essential if the product is to exist at all." *NCAA v. Board of Regents*, 468 U.S. at 101; (Pet. App. at 12a). Rather than applying the Rule of Reason to the restraint at issue and imposing the burden of persuasion on plaintiffs, the Court of Appeals presumed, contrary to the dictates of *Board of Regents*, that the restraint would have a strong anticompetitive impact because – absent the holding in *Board of Regents* – the restriction would be *per se* unreasonable.[6] It then required the NCAA to prove that the restraint was reasonable. (Pet. App. at 19a). In so doing, as a practical matter the court placed the burden of persuasion on the defendant to prove the overall reasonableness of the restraint, contrary to the express holding in *Board of Regents* and this Court's prior pronouncements that the plaintiff bears the burden of showing that a restraint is unreasonable.

Moreover, the Court of Appeals approached with skepticism the justifications for the restraint proffered by the NCAA. The Court simply substituted its judgment for how the NCAA could best accomplish its objectives, determined that the NCAA had not imposed a restriction that would most effectively accomplish its objectives, and

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[6] The Tenth Circuit reasoned that the restraint in question is "price-fixing" which has "obvious anticompetitive effects." (Pet. App. at 17a). The court, however, ignored that the restriction was not an agreement on the prices for which competitors would *sell* their output, (the traditional definition of price-fixing,) but an agreement on what the competitors would *pay* for inputs into their product. Joint purchasing arrangements are not obviously anticompetitive. *See Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985). Thus, unlike some horizontal restrictions that may be quickly condemned, the restraint at issue here could not be peremptorily declared to have an obvious anticompetitive effect. A market analysis was required but not undertaken by the court below.

then rejected the NCAA's justifications as pretexts. The court further rejected the NCAA's cost reduction justification because it speculated that a more effective way to accomplish this objective would be to limit the total expenditures that member institutions spend on basketball. (Pet. App. at 24a). The competitive balance and preservation of entry level coaching position justifications were rejected because the Tenth Circuit speculated that the NCAA could accomplish this objective by placing a limit on the amount of experience a restricted earnings coach could have. (Pet. App. at 21a, 25a). Amici do not contend that justifications can never be pretextual or insufficient; rather, amici are concerned that the Tenth Circuit second-guessed the NCAA freely and without any attempt to put the decision of the organization to impose the restriction into context, from both an economic and a political standpoint.

II. THE FIFTH CIRCUIT COURT OF APPEALS AND OTHER COURTS HAVE PROPERLY RECOGNIZED THE IMPORTANCE OF COST REDUCTION EFFORTS TO INTERCOLLEGIATE ATHLETICS. HOWEVER, THE TENTH CIRCUIT'S REFUSAL TO DO SO CREATES A SPLIT IN THE CIRCUITS THAT THREATENS THE FUTURE OF THESE CONFERENCES UNLESS THE COURT GRANTS THE NCAA'S PETITION.

A. The *Board of Regents'* decision dictates that Courts should focus on the product of intercollegiate athletics in its entirety.

In contrast to the decision of the Tenth Circuit, other courts have properly considered why horizontal restraints by intercollegiate sports organizations are necessary for the existence of the product they offer. These courts have understood that the "product" at issue is

competitive intercollegiate sports in their entirety, not an individual institution's specific sports program. For example, in *Hennesey v. NCAA*, 564 F.2d 1136 (5th Cir. 1977) (*per curiam*), the Court of Appeals reasoned that cost reduction efforts by the NCAA, in the form of a limit on the number of assistant coaches, were reasonable because they were designed to help ensure that intercollegiate athletic programs would be provided in many sports:

> Colleges with more successful programs, both competitively and economically, were seen as taking advantage of their success by expanding their programs, to the ultimate detriment of the whole system of intercollegiate athletics. Financial pressures upon many members, not merely to 'catch up' but to 'keep up,' were beginning to threaten both the competitive, and amateur, nature of the programs, leading quite possibly to abandonment by many. 'Minor' and 'minority' sports were viewed as imperiled by concentration upon the 'money makers,' such as varsity football and basketball.

564 F.2d at 1153.

The Tenth Circuit below specifically rejected the reasoning of the Fifth Circuit in *Hennesey*: "We are dubious that the goal of cost reductions can serve as a legally sufficient justification for a buyers' agreement to fix prices *even if such cost reductions are necessary to save inefficient or unsuccessful competitors from failure.*" (Pet. App. at 23a-24a) (emphasis added). This approach is in direct conflict with *Hennesey*[7] as well as with the holding

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[7] Indeed, *Hennesey* sustained as lawful under Section 1 of the Sherman Act an NCAA restriction on the number of assistant coaches that a member institution could employ in men's basketball and football. *Hennesey*, 564 F.2d at 1153. The

of this Court in *Board of Regents* that *per se* rules should not apply to intercollegiate athletic organizations because horizontal restraints may be necessary for the "product" of competitive intercollegiate sports to be available at all. *See Board of Regents*, 468 U.S. at 101.

Intercollegiate athletics, in general, is the product as the *Board of Regents'* decision dictates. *Compare* Pet. App. at 12a-13a ("The 'product' made available by the NCAA in this case is college basketball . . . "), *with Board of Regents*, 468 U.S. at 101-02 ("What the NCAA and its member institutions market in this case is competition itself – contests between competing institutions. . . . ").

B. The consequences of extremely limited institutional funding are important factors the Tenth Circuit should have considered.

In fact, and contrary to the view adopted by the Tenth Circuit, efforts at cost reduction and other restrictions on inputs are necessary for the "product" of competitive intercollegiate athletics to exist at all. Within an educational institution, intercollegiate athletic programs compete with academic and technical programs for funding. Funding is not unlimited. Importantly, not one

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Tenth Circuit now holds that an NCAA restriction on the maximum salary that could be paid to one of four permitted men's basketball coaches at each member institution would violate Section 1 of the Sherman Act. Since *Hennesey* would permit the NCAA to decide that there could only be three basketball coaches, it is hard to see how the present plaintiffs, all of whom were subject to the salary restriction, would have been harmed less if the NCAA had decided to limit the total number of coaches to three. The Fifth Circuit's reasoning is the proper statement of the law. However, the Tenth Circuit's finding that *Hennesey* is not good law creates a split in the Courts of Appeals that this Court should resolve.

educational institution of any of amici has as its primary purpose the sponsoring of sporting contests. Indeed, all member institutions have academic goals as their primary purpose.[8] As a result, few if any educational institutions devote significant funds from tuition or state funding to athletics. Typically, colleges and universities require either that their athletic departments pay for themselves or be able to operate on a tiny fraction of the institution's total funding.[9] One study of intercollegiate athletics at NCAA Division 1-A member institutions showed that in 1995, on average, athletic departments operated at a small

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[8] The purposes of the conferences are tied to the educational missions of their member institutions. For example, the Big Twelve Conference has among its purposes the objectives of "formulat[ing] principles to guide the conduct of the athletic programs of the highest quality and character *consistent with the missions of the Member Institutions*," "build[ing] upon the alliance fostered by the Conference's athletic programs *to advance the academic missions of the Member Institutions*" and "assist[ing] its Member Institutions in the maintenance of programs of intercollegiate athletics *which are compatible with the highest standards of education*." Bylaws of The Big Twelve Conference, Inc., § 1.3.1 (emphasis added). *See also*, Bylaws of Big Sky Conference, Inc., Art. III ("The members of this Conference are dedicated to a continuing effort to maintain intercollegiate athletics in harmony with the essential educational purposes of each member's institution.").

[9] For example, in the Pacific-10 Conference, one member institution provides no funding to its athletic department, requiring the athletic programs of the school to operate on funds generated solely by the athletic department, while another institution provides no financial support for its athletic department beyond tuition waivers for some of the institution's athletes. In contrast, three other institutions have budgets that are funded in part by revenues from outside the institution's athletic revenues, ranging from ten to over twenty percent of the total budget.

loss ($237,000), with men's programs, on the whole, producing net revenues and women's programs operating at a net loss. *See* Daniel L. Fulks, *Revenues and Expenses of Divisions I and II Intercollegiate Athletic Programs-1995*, Attachment 3, at 13 (U. of Kentucky School of Accountancy 1995).

The extremely limited institutional funding available for college athletics has important consequences for athletic departments. Only a few college sports generate revenues sufficient to pay for their own program, most notably basketball and football. For example, in The Big 12 Conference, the members of the Conference offer intercollegiate athletic programs in between 8 to 12 sports for male students and from 9 to 12 sports for female athletes. Yet members of the conference reported generating net revenues in only two programs: men's basketball and men's football. Similarly, in the Big Sky Conference there are nine member institutions, each offering from 12 to 20 intercollegiate sports for male and female students. Of the nine institutions, only four schools had sport programs that generated net revenues: three schools that generated net revenues from their men's basketball program and one school that had both its men's football and men's basketball program produce revenues in excess of program expenses.

Unless institutions are able to restrict the amount of funding devoted to paying programs, there will not be sufficient funding for many non-paying programs,[10] and non-revenue sports would have to be dropped, a result

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[10] Even small cost savings in the paying programs can pay for a program that is not financially self-sustaining. For example, one member of the Pacific-10 Conference has an intercollegiate fencing program that requires $30,000 in total funding. Only a minuscule portion of the needed revenues is generated by the program itself.

directly inconsistent with the purpose of intercollegiate athletics. The purpose of an educational institution in offering intercollegiate athletics is based on the premise that it is an important option to be made available to all students for their educational development, not merely to those who can participate in a sport where the program can be financially self-supporting.[11] Consequently, it is important that educational institutions be able to restrict the funding that is devoted to financing those programs that are financially self-supporting. Yet the Tenth Circuit simply dismissed these issues without discussion: "[W]e

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[11] There are also legal reasons for educational institutions to evaluate the funding of their intercollegiate athletic programs as a whole rather than on a program-by-program basis. Almost all of the member institutions of the NCAA and the conferences are subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, which prohibits gender-based discrimination by educational institutions receiving federal funding. The Department of Education has adopted regulations to implement Title IX in the context of college sports. *See* 34 C.F.R. § 106.41. In general, gender segregated sports are prohibited under these regulations unless the sport is a contact sport or the institution offers comparable teams in the sport for both genders. *See* 34 C.F.R. § 106.41(b). The decisions below simply ignored the legal realities faced by educational institutions who must comply with Title IX. There is reason to doubt that federally-funded educational institutions could justify offering a men's basketball program that paid for itself and fail to offer a women's basketball program because that program would not be financially self-sustaining. As one court has noted, "Title IX does not purport to override financial necessity. Yet, the pruning of athletic budgets cannot take place in comptrollers' offices, isolated from the legislative and regulatory imperatives that Title IX imposes. . . . [E]ven a balanced use of the budget-paring knife runs afoul of Title IX where, as here, the fruit's of a university's athletic program remains ill-distributed after the budget trimming takes place." *Cohen v. Brown University*, 991 F.2d 888, 905-906 (1st Cir. 1993).

need not consider whether cost reductions may have been required to 'save' intercollegiate athletics . . . There is no reason to think that money saved by a school on the salary of a restricted earnings coach will not be put into another aspect of the school's basketball program." (Pet. App. at 24a).

Individual decisions by educational institutions to restrict funding for their paying sports programs are difficult because of the need to schedule contests that will be attractive to consumers. The public will rarely pay to watch intercollegiate contests where the teams are not of relatively equal strength and able to engage in a competitive contest. If the public believes that an athletic contest, which they are asked to pay to view, does not offer a match up in which either side could prevail or that otherwise promises to be an exciting game, it is unlikely they will pay for the privilege of viewing. In that event, even the sports programs that currently pay for themselves may no longer be self-sustaining. To avoid this result, a single institution would have to do the impossible and the impractical. That is, a single institution would have to find some way to restrict unilaterally funding for its paying programs while at the same time search for other institutions that have done about the same to include on its schedule. We submit that it is impractical if not impossible for a single institution to restrict its funding, unilaterally, and hope to compete effectively or, for that matter, schedule comparable opponents at all.

The very existence of a conference serves to reduce scheduling costs among its member institutions and aids in maintaining a competitive balance among the various colleges and universities. For example, a typical team schedule is comprised of a high percentage of contests

with other teams in its conference.[12] Moreover, the conference is able to establish rules and regulations that help to level the playing field of the teams of the conference in a way that is consistent with the educational objectives of the institutional members of the conference. These rules and regulations supplement those of the NCAA. The NCAA restriction on coaches salaries at issue here, NCAA limitations on payments that may be made to student-athletes, as well as the minimum academic standards for student-athletes and limitations placed on athletic eligibility imposed by the NCAA and the conferences, all help serve to reduce the overall informational costs of scheduling and to maintain a competitive balance in intercollegiate athletics.

Rules and regulations designed to reduce costs in financially self-supporting sports help to increase output by permitting the funding of other athletic programs that are not financially self-sustaining. These regulations thereby allow an educational institution to offer the educational benefits of intercollegiate athletics[13] to a broad range of students, rather than simply those students who have the ability to compete in sports that are financially self-sustaining. These restrictions also improve the quality of output thereby improving the likelihood of evenly

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[12] In the Pacific-10 Conference, over two-thirds of all men's and women's basketball games played by its member institutions are accounted for by intraconference games. Slightly over half of all men's baseball and women's softball games played by all member institutions of the conference are intraconference contests.

[13] Among the educational benefits of intercollegiate sports are the teaching of good sportsmanship, teaching students the benefits of effort, dedication, and teamwork, and to help students to learn time management skills and to deal with adversity.

matched, exciting athletic contests.[14] Finally, the restrictions reduce the costs of scheduling sporting events that are likely to be exciting and therefore attractive to paying fans.

III. THE ANALYSIS OF THE FIFTH CIRCUIT AND OTHER COURTS REFLECTS A PROPER UNDERSTANDING OF THE OPERATIONS OF INTERCOLLEGIATE ATHLETIC ORGANIZATIONS WHICH SHOULD BE EMBRACED BY THIS COURT INSTEAD OF THE TENTH CIRCUIT'S DECISION.

The logic of the court of appeals below in summarily rejecting these justifications evinces a lack of understanding of the way in which intercollegiate organizations work. The Court of Appeals reasoned that the restriction in question was either ineffectual or pretextual because there were better ways to accomplish the NCAA's stated purposes in passing the rule. It found that the restriction in question could not have been intended to preserve entry-level coaching positions or to maintain competitive

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[14] The Tenth Circuit found that the restriction in question prevented individual schools from competing to improve the quality of individual teams by competing to hire coaches. (NCAA Cert. Petition at 22a). In so doing, the court ignored that the "product" in question is not an individual athletic team at an individual school, but competitive intercollegiate sports as a whole. *See Board of Regents*, 468 U.S. at 101.

Moreover, even if the focus were more narrow, the product is no more narrow than a particular intercollegiate athletic sporting contest. Few would argue that lopsided contests are of higher quality to fans than closely-matched, see-saw contests. Yet this is precisely the counterintuitive – and incorrect – conclusion that is implicit in the analysis of the court of appeals below.

balance among schools because it did not prohibit experienced coaches from filling the positions in question. (Pet. App. at 21a, 25a). Moreover, it reasoned that the restriction in question could not serve to reduce costs because the restriction "does not equalize the amount of overall money Division 1 schools are permitted to spend on their basketball programs." (Pet. App. at 24a). In so doing, the Tenth Circuit assumed that intercollegiate sports organizations operate as a centrally planned monolith with a single decision maker. This assumption is incorrect.

Like the NCAA, amici operate as democratic institutions and decisions are based on a consensus.[15] Not all schools face exactly the same funding issues: some member institutions may provide some funding for their athletic programs, while others do not;[16] even within the same athletic conference, not all member institutions offer the same sports programs;[17] not all member institutions derive the same revenues from their athletic programs;[18]

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[15] For example, the By laws of The Big Twelve Conference provide that all regulations for the conduct of sporting contests and athletic programs must be approved by a democratic vote of the member institutions. By laws of The Big Twelve Conference, Inc., §§ 1.5.2(b)(3), 1.5.3 (vote of 75% of directors with each member institution having one director). The by-laws of the other amici also require a democratic decision on such regulations.

[16] *See* n. 9, *supra*.

[17] In the Pacific-10 Conference, Stanford University offers 17 intercollegiate athletic programs for men and 18 for women, whereas Washington State University offers six men's programs and nine programs for women.

[18] For example, in the Big Sky Conference, the member institution that generates the most revenue from its athletic programs has revenues that are 194% of the revenues generated by the member institution that has the lowest revenues from intercollegiate athletics. For 1995 in all of Division 1-A, the

and some members are public institutions while others are private.[19] Given the varying interests of the member institutions of an intercollegiate organization, it is hardly surprising that the democratic process yields rules that may not be perfectly tailored to the goals of the intercollegiate athletic organization. The Tenth Circuit's assumptions regarding the most efficient means to accomplish the NCAA's stated objectives simply ignore the reality that intercollegiate sports organizations uniformly employ a democratic method of governance and that the interests of the individual member institutions belonging to the organization are varied.

If member institutions have no assurance that a democratic process will protect them, they may withdraw from their intercollegiate athletic conferences. Ultimately, the viability of the conferences will be threatened and the costs of scheduling athletic contests will rise. Consumers of the intercollegiate athletics market may also be deprived of the traditional rivalries which are often fostered by the existence of conferences.

Unless the Court grants the petition of the NCAA and reviews these decisions, colleges and universities, especially those located within the confines of the Tenth Circuit, will lose the ability to regulate their intercollegiate athletic programs so that they remain true to their

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institution with the intercollegiate athletic programs that generated the most revenue earned 2.6 times as much revenue as the average revenue generated by all schools. Fulks, *supra*, at Attachment 3, p. 13.

[19] In the Big Ten Conference, ten of the member institutions are public while one is private. Eight of the Pacific-10 Conference's member institutions are public and two are private. In the Big Twelve Conference, all member institutions except one are public.

educational goals. In the near term, the viability of conferences with member institutions located within the confines of the Tenth Circuit will be threatened as institutions not located within the bounds of the Tenth Circuit seek to align themselves with conferences not subject to jurisdiction in the Tenth Circuit. Students who participate in athletic programs that are not financially self-sustaining will face reduced funding for, and possible elimination of, the sports programs in which they participate. The quantity and quality of intercollegiate athletics will decline. If these results are not mandated by the antitrust laws, these consequences need not be endured.

CONCLUSION

The decisions below have important consequences for intercollegiate athletics. The consequences discussed herein can only be avoided if this Court grants the NCAA's petition for a writ of certiorari and decides the case on the merits. Amici respectfully submit that the Court should grant the petition and reverse the decision below.

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APPENDIX

THE BIG TWELVE CONFERENCE, INC. BYLAWS

(in pertinent part)

1.3.1 *Purposes.* The purposes of the Conference are to:

1.3.1.3 Formulate principles to guide the conduct of athletic programs of the highest quality and character consistent with the missions of the Member Institutions and the Conference.

1.3.1.4 Promote and coordinate programs of academic cooperation and build upon the alliance fostered by the Conference's athletic programs to advance the academic missions of the Member Institutions.

1.3.1.5 To assist its Member Institutions in the maintenance of programs of intercollegiate athletics which are compatible with the highest standards of education and competitive sports. To this end, through the orderly establishment and enforcement of legislation, the Conference aims to:

(a) Regulate intercollegiate athletics among the Member Institutions;

(b) Encourage sound academic practices for student-athletes;

(c) Stimulate good sportsmanship; and

(d) Promote mutual trust and friendly intercollegiate athletic relations between Member Institutions.

1.5.2 *Powers Reserved to the Board of Directors and Vote Required.*

(b) The following actions may be taken only if approved by the affirmative vote of seventy-five percent (75%) of more of the Directors then in office:

(3) Amendments or modifications to the role and authority of the Board of Directors and the Advisory Committees.

1.5.3 *Number, Election and Term.* The number of Directors of the conference shall equal the number of Member Institutions in the Conference, consisting of one (1) representative for each Member Institution, who shall be the Chief Executive Officer (President or Chancellor) of each Member Institution. Annually, each Member Institution shall certify to the Conference the name of its Chief Executive Officer (President or Chancellor) and such person shall be elected as a Director as provided in these Bylaws and shall hold office until his or her successor has been elected or appointed and has qualified. Because of the special relationship of the Directors to the Member Institutions, a Director may not be removed as long as the Director is the Chief Executive Officer (President or Chancellor) of a Member Institution.

BIG SKY CONFERENCE, INC.
BYLAWS
(in pertinent part)

ARTICLE III

The members of the Big Sky Conference subscribe to the principle that intercollegiate athletics is a vital part of higher education, is regarded as an integral part of the educational program, and the intercollegiate athletic experience is equally valuable for both male and female students. The member Institutions are committed to providing athletic opportunities on an equitable basis without regard to gender. The intercollegiate athletic

programs shall be administered and conducted in a manner consistent with the institutions' educational policies.

Fundamental to the successful application of any set of rules is the spirit of mutual confidence and cooperation. It is the function of this Conference to encourage intercollegiate athletics on an amateur basis with institutional control.

The members of this Conference are dedicated to a continuing effort to maintain intercollegiate athletics in harmony with the essential educational purposes of each members' institution. To reinforce these principles, the Big Sky Conference believes in and subscribes to the fundamental purposes, policies, and principles governing the conduct of intercollegiate athletics as adopted by the National Collegiate Athletic Association (NCAA). These include the purposes and fundamental policy contained in Article 1 of the NCAA Constitution. The principles for conduct of intercollegiate athletics are found in Article 2 of the NCAA Constitution and include the following principles:

Institutional Control and Responsibility
Student-Athlete Welfare
Gender Equity
Sportsmanship and Ethical Conduct
Sound Academic Standards
Nondiscrimination
Diversity Within Governance Structures
Rules Compliance
Amateurism
Competitive Equity
Recruiting
Eligibility
Financial Aid

App. 4

Playing and Practice Seasons
Postseason Competition and
Contests Sponsored by
Non-collegiate Organizations
Economy of Athletics Program
Operation

No. 97-2004

In the Supreme Court of the United States

OCTOBER TERM, 1998

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, PETITIONER

v.

NORMAN LAW, ANDREW GREER, PETER HERRMANN, MICHAEL JARVIS, JR., CHARLES M. RIEB, DOUG SCHREIBER, LAZARO COLLAZO, ROBIN DREIZLER, AND FRANK CRUZ, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF FOR THE PETITIONER

There is no hint in the brief in opposition — just as there was no hint in the opinions of the courts below — that any consumer harm will result from the REC Rule that has been invalidated on summary judgment. Respondents avoid any consumer welfare analysis by hiding behind the label "price fixing," just as the court of appeals avoided serious economic analysis by labeling the supposed anticompetitive effect "obvious." In an antitrust case, failure to link a challenged practice to consumer welfare is no small defect. "Congress designed the Sherman Act as a 'consumer welfare prescription.'" *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979). That the NCAA (at the expense of its member colleges) has been ordered to pay $67 million to assistant coaches (see Br. in Opp. 6 n.5, 11 n.8) tells us nothing about harm to consumers or to competition.

"The history of antitrust is littered with practices condemned because of misunderstanding." Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 21 (1984). Simplistic misunderstanding is respondents' approach. They insist that the REC Rule is a "naked price restraint"; that it is "obviously anticompetitive"; and that the REC Rule, which limits an *input* to college basketball, is "nearly identical" to the *output* restraint on telecasts of football games that was condemned in *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984). They even claim, in the teeth of the record (*e.g.*, Pet. App. 89a), that the NCAA "admitted" that the REC Rule was anticompetitive.

Respondents' broad assertions cannot obscure the inconsistency between the decision below and this Court's precedents, or the conflicts between the decision below and decisions of other courts of appeals. To allow the decision to stand could seriously compromise the NCAA's ability to engage in the legitimate regulation of athletics that this Court resoundingly endorsed in *Board of Regents*.

1. The Sherman Act is concerned with harm to the competitive process (and thus to consumers), not with every setback to those who wish to sell goods or services. Unable to show that the REC Rule harmed consumers at all, respondents mischaracterize it as a "naked horizontal price restraint" and "garden-variety price fixing"; they even suggest, as if *Board of Regents* did not exist, that the Rule should be condemned per se. Br. in Opp. 2, 7, 18, 19 n.14. But this Court explained almost 20 years ago that the fact that two parties have "literally" fixed a price does not necessarily mean

that they have engaged in "per se price fixing" violating the antitrust laws; *that* inquiry focuses on whether the practice would "restrict competition *and decrease output*." *BMI* v. *CBS*, 441 U.S. 1, 9, 19-20 (1979) (emphasis added). A horizontal price "restraint is 'naked'" and thus may be condemned per se "*only* when the agreement is *not* ancillary to cooperative productive activity engaged in by the agreeing parties." R. BORK, THE ANTITRUST PARADOX 263 (2d ed. 1993) (emphasis added); see *BMI*, 441 U.S. at 23.

The REC Rule, however, plainly *is* ancillary to the "cooperative productive activity" of the NCAA, *i.e.*, its "procompetitive" mission of producing intercollegiate sports and maintaining their "character and quality." *Board of Regents*, 468 U.S. at 102. Respondents can label the REC Rule "naked" and "garden-variety" only by ignoring its context. But that context dictates that NCAA rules must be evaluated with due regard for the "cooperation" that "is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved." *Id.* at 117.

The distinction between "naked" horizontal agreements and those that are ancillary to joint productive activity is fundamental in antitrust analysis in business and sports contexts alike, as *BMI* demonstrates. But mislabeling an ancillary restraint as "naked" leads to especially anomalous results in an amateur sports context. As this Court recognized in *Board of Regents*, horizontal agreements are necessary to permit individual schools to maintain "effectiveness as * * * competitor[s] on the playing field." 468 U.S. at 101-102. Only agreements of that sort can assure schools that their athletic competitors will abide by the same rules. The Court's blessing of horizontal restraints that enhance competition on the basketball court highlights a major distinction between the NCAA context and business contexts. Businesses rarely have any legitimate interest in equalizing competition; in the sports context fair and robust competition is the very product that is being sold.

In holding on summary judgment that the REC Rule was a "naked" restraint, the lower courts simply discounted the evidence of its procompetitive justifications.[1] See Pet. 3-5, 24-27. Indeed,

[1] The Tenth Circuit seems to have thought that, because this Court had condemned an NCAA rule in *Board of Regents*, a lower court was entitled to condemn *summarily* a different NCAA rule. But *Board of Regents* was a fact-intensive opinion that — particularly in the section rejecting the NCAA's justifications, 468 U.S. at 113-120 — relied heavily on the *findings* made after

they missed the fundamental point that college basketball is necessarily a cooperative enterprise, and that NCAA members are not atomistic competitors producing one-team basketball exhibitions. Unlike the output restrictions on broadcasts of football games in *Board of Regents*, the REC Rule limits how "competitors * * * create and define the competition to be marketed." 468 U.S. at 101.

There was ample evidence that the REC Rule — which closed loopholes in its judicially approved predecessor — was designed to serve this end. The Rule leveled the playing field by ensuring that schools with the resources to evade the old rule no longer could hire five experienced, full-time coaches while their rivals could hire only the allotted three. The Rule also relieved resource-constrained athletic departments from a Hobson's Choice: either hire a true "restricted earnings" coach while rivals add *de facto* full-time coaches, or shift funds to basketball coaching at the expense of other participatory sports desired by students. See Amicus Br. of America East Conf., *et al.*, at 11 & n.10. The REC Rule, with its compensation cap, shifted "sham" part-time coaches into fully paid positions, more effectively preserving entry-level positions for *bona fide* graduate assistants and other coaching neophytes.

2. The REC Rule was not "garden-variety" price fixing for another reason. It is hornbook law that "[p]articular forms of price fixing by buyers may not be unlawful" at all. 1 J. VON KALINOWSKI ET AL., ANTITRUST LAWS & TRADE REGULATION § 13.02, at 13-7 (2d ed. 1998). Under modern antitrust jurisprudence, the treatment of price agreements among buyers, such as the price *cap* here, need not be symmetrical with the treatment of price fixing by sellers. *E.g.*, *Northwest Wholesale Stationers, Inc.* v. *Pacific Stationery & Printing Co.*, 472 U.S. 284, 295 (1985). Other courts of appeals recognize this distinction,[2] which is grounded in logic:

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a trial and affirmed on appeal. It is not a precedent for rejecting the NCAA's justifications *without* a trial. In similar circumstances, the Ninth Circuit reversed a district court ruling that invalidated a sports league's relocation rule on summary judgment, noting that the prior Ninth Circuit opinion on which the district court had relied had invalidated a relocation rule only after intensive factual inquiry into the league's justifications. See *NBA* v. *SDC Basketball Club, Inc.*, 815 F.2d 562, 567-568 (9th Cir. 1987).

[2] See, *e.g.*, *Adaptive Power Solutions* v. *Hughes Missile Systems*, 141 F.3d 947, 950, 952-953 (9th Cir. 1998), petition for cert. pending, No. 98-150; *United States* v. *Brown University*, 5 F.3d 658, 670 (3d Cir. 1993); *Kartell*

joint agreements by buyers may lower prices, and "[l]ow prices * * * benefit consumers regardless of how those prices are set." *State Oil Co.* v. *Khan*, 118 S. Ct. 275, 282 (1997). See Pet. 14-17.

Contrary to respondents' caricature of our position (Br. in Opp. 8-10), we do not maintain that horizontal agreements on price among buyers are *exempt* from the Sherman Act. We agree that "antitrust law forbids all agreements among competitors (such as competing employers) that *unreasonably* lessen competition." *Brown* v. *Pro Football, Inc.*, 518 U.S. 231, 241 (1996) (emphasis added) (upholding agreement among NFL owners on payments to players). We merely contend that what is *unreasonable* in this context must be determined with due recognition that inputs, not outputs, are being restricted and that the parties are engaged in a joint productive sports enterprise. See *id.* at 252 (Stevens, J., dissenting) (although "the market-wide agreement among these employers fixed the salaries * * * at a dramatically lower level than would obtain in a free market, * * * the special characteristics of this industry may provide a justification for the agreement under the rule of reason, see *[NCAA]* v. *Board of Regents*") (emphasis added).

Antitrust law does not *peremptorily* condemn buying-side restraints in the absence of showings of market power and constriction of the ultimate *output* — which could harm consumers. See *Northwest Stationers*, 472 U.S. at 295. Economic principles and decisions of this Court amply support that view.[3] Even in *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219

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v. *Blue Shield*, 749 F.2d 922, 931 (1st Cir. 1984) (Breyer, J.).

[3] Respondents rely (Br. in Opp. 8) on several antiquated boycott cases, including *Radovich* v. *NFL*, 352 U.S. 445 (1957), and *Anderson* v. *Shipowners' Ass'n*, 272 U.S. 359 (1926). *Radovich* and *Anderson* do not support a claim that joint-venture salary limits are condemned per se. In those cases, this Court primarily considered whether the alleged employer boycotts indirectly restrained interstate "commerce" within the terms of the Sherman Act. See 15 U.S.C. § 17 ("The labor of a human being is not a commodity or article of commerce."). *Radovich* did not mention salary levels at all. The *Anderson* opinion mentioned an agreement on wage levels in passing, but the plaintiff complained only that he had been refused employment, not that he had been paid too little. 272 U.S. at 362. The Court's substantive discussion simply repeated the long-abandoned view that condemned *any* agreement that restrained individual businesses' "freedom to carry on interstate and foreign commerce according to their own choice and discretion." *Id.* at 365.

(1948), this Court condemned a price-fixing agreement among buyers only after extensively discussing and analyzing their market power, and focused on the *output* effects of the challenged restraint. *Id.* at 239-242. The Court made clear that it condemned that restraint based on specific market facts, and that a "significantly different" setting might require a different analysis — scarcely the knee-jerk per se approach that respondents rely on here. *Id.* at 244; see also Jacobson & Dorman, 36 ANTITRUST BULL. 1, 30 (1991).

Faced with inhospitable precedent, respondents suggest (Br. in Opp. 7) that the NCAA has waived the right to explain why the input-side aspects of the REC Rule confirm that the Tenth Circuit misapplied the epithet "obvious[ly] anticompetitive." In respondents' sole and inapposite authority, *Delta Air Lines* v. *August*, 450 U.S. 346, 362 (1981), the petitioner waived a separate *question* based on a different Federal Rule of Civil Procedure. See No. 79-814, Pet. 2. But the question presented in our petition does not focus on a "conflict regarding the application of Section 1 of the Sherman Act to combinations of buyers as opposed to sellers." Br. in Opp. 8. Rather, the buying-side character of the REC Rule supplies a supplemental *reason* why the REC Rule was not so "obvious[ly] anticompetitive" as to excuse serious antitrust analysis — a question that plainly is presented and unquestionably was preserved.

Accordingly, the *argument* based on the differing nature of input restraints is properly before the Court. "Once a federal *claim* is properly presented, a party can make *any* argument in support of that claim; *parties are not limited to the precise arguments they made below.*" *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992) (emphasis added). Even an argument that was "expressly disavowed" below may support reversal by this Court if the contention is "not a new claim" but rather is a "new argument to support" a "consistent claim." *Lebron* v. *National Railroad Passenger Corp.*, 513 U.S. 374, 378-379 (1995). The NCAA has consistently maintained that the REC Rule is not anticompetitive and has not forfeited any right to argue fully in support of that position here.[4]

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[4] Respondents also hint (Br. in Opp. 6, 18) that perhaps the judgment below should not be reviewed because it is "interlocutory." This Court unquestionably has jurisdiction to review interlocutory judgments, R. STERN ET AL., SUPREME COURT PRACTICE § 4.18, at 195 (7th ed. 1993), and it has exercised that jurisdiction to review some of its most prominent antitrust and securities cases. See, *e.g.*, *State Oil*, *supra*; *Central Bank* v. *First Interstate Bank*, 511

3. The court below candidly "disagree[d]" with *Hennessey* v. *NCAA*, 564 F.2d 1136 (5th Cir. 1977), which it found "unpersuasive" and "err[oneous] as a matter of law." Pet. App. 19a, 25a, 26a. Respondents claim that *Hennessey* and *Board of Regents of the University of Oklahoma* v. *NCAA*, 561 P.2d 499 (Okla. 1977), "have been superseded by * * * *Board of Regents*" (Br. in Opp. 11), but this Court cited *both* cases to illustrate how the NCAA performs its "procompetitive" and "vital role in enabling college [athletic competition] to preserve its character." 468 U.S. at 101-102 n.24; see also *id.* at 122, 123 (dissent) (citing *Hennessey*).[5]

Respondents try to distinguish *Hennessey* by asserting that the restriction in that case had "no effect on [coaches'] salaries." Br. in Opp. 10. That is not true: the Fifth Circuit acknowledged that limiting the number of full-salary coaches might "stabilize, if not depress, the compensation which any assistant coach can obtain for his services." 564 F.2d at 1153. Indeed, one plaintiff in *Hennessey* showed that his salary had been reduced from $20,000 to $2100 because of the coaching limitation at issue there. *Id.* at 1141 n.3.

More important, the rule approved in *Hennessey* and the REC Rule have the same purpose (promoting competitive parity) and the same effect: fewer coaching positions with unrestricted salaries. Just as an "agreement on output * * * equates to a price-fixing agreement," *General Leaseways, Inc.* v. *National Truck Leasing Ass'n*, 744 F.2d 588, 594 (7th Cir. 1984) (Posner, J.), limitations

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U.S. 164 (1994); *Eastman Kodak Co.* v. *Image Technical Servs.*, 504 U.S. 451 (1992); *Summit Health, Ltd.* v. *Pinhas*, 500 U.S. 322 (1991); *Matsushita Elec. Indus. Co.* v. *Zenith Radio*, 475 U.S. 574 (1986); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375 (1983); *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36 (1977); *TSC Indus.* v. *Northway, Inc.*, 426 U.S. 438 (1976). This important case, which has now produced a $67 million judgment based on the legally erroneous Tenth Circuit judgment, warrants similar treatment.

[5] *Hennessey* — and not the decision below — accords with more recent decisions of the courts of appeals that have upheld NCAA horizontal restraints under the rule of reason "without difficulty." *McCormack* v. *NCAA*, 845 F.2d 1338, 1344 (5th Cir. 1988). See *Smith* v. *NCAA*, 139 F.3d 180, 187 (3d Cir. 1998) (affirming dismissal because restraint "clearly survives a rule of reason analysis"), petitions for cert. pending, Nos. 98-84, 98-107; *Hairston* v. *Pacific 10 Conf.*, 101 F.3d 1315, 1320 (9th Cir. 1996); *Banks* v. *NCAA*, 977 F.2d 1081, 1087-1094 (7th Cir. 1992). The contrast between the prompt rejections of antitrust challenges in *Smith* and other cases and the summary condemnation here underscores the need for further guidance from this Court.

on the number of purchases are equivalent to limitations on the price to be paid. No coherent antitrust jurisprudence would permit NCAA members collectively to limit to three the openings available to respondents, but award respondents massive treble damages because the schools added a fourth position with limited compensation. Such a bizarre distinction can be advanced only if there is something sacred about "price" that requires rigid legal rules unrelated to economic reality. Yet that attitude is completely out of step with this Court's jurisprudence. See *State Oil*, 118 S. Ct. at 282; *BMI*, 441 U.S. at 9, 19-20, 23; cf. *Kodak*, 504 U.S. at 466-467 ("presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law").[6]

4. Respondents repeatedly claim that "the NCAA admitted the anticompetitive effects" of the REC Rule. Br. in Opp. i, 4, 7, 12, 14 n.11. The district court opinion belies that fabrication: "The NCAA first argues that the [REC] Rule has no anticompetitive effect * * *." Pet. App. 89a.

Respondents' tactic highlights their — and the Tenth Circuit's — legally deficient view of "anticompetitive effects." The NCAA acknowledged only that "some restricted earnings coaches were paid $60,000 to $70,000" (Pet. App. 90a) before the REC Rule took effect, and that such incomes were not available from "*restricted earnings*" positions afterward.

As explained above, the competitive effects of the REC Rule properly should be gauged in the output market in which college basketball competes with other sports entertainment. But even considering the input market for coaching services, modern rule-of-reason analysis focuses on market-wide effects on *competition* rather than specific adverse effects on a particular plaintiff. In finding on summary judgment that the "anticompetitive effects" of the REC Rule were "obvious," however, the Tenth Circuit did not even *identify* the market in which those effects occurred. Instead, the court simply assumed its conclusion, asserting that the REC Rule had "obvious anticompetitive effects" — effectively according the REC Rule per se treatment — without considering the substan-

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[6] As the Solicitor General — who *supported* condemnation of the NCAA rule at issue in *Board of Regents* — observed, "the mere fact that prices are in some sense 'fixed' or that competitors may be excluded does not automatically resolve the question of legality under the Sherman Act." Br. for the United States as Amicus Curiae at 6, *Board of Regents* (footnote omitted).

tial competition for coaches' services *by the very schools subject to the REC Rule*, not to mention the many other competing buyers of coaching services. See Pet. 5-6. As we explained in the petition (at 21), indistinct evidence of effects on the salary of "some" unnamed coaches — without consideration of the coaches' alternative sources of employment in the relevant market — establishes at most an effect on individuals, not on the market for their services.[7]

Respondents assert (Br. in Opp. 12) that a "quick look" under the rule of reason does not require *any* market analysis. But that is not so. "[T]he initial 'quick look' should be more than a casual glance." Schmalensee, *Agreements Between Competitors*, in ANTITRUST, INNOVATION, AND COMPETITIVENESS 98, 110-111 (Jorde & Teece, eds., 1992). Respondents do not dispute that other courts of appeals require a threshold showing of market power before applying a "quick look" rule of reason unless *marketwide* anticompetitive effects have been shown.[8] See Pet. 18-21.

The problem in this case is that the Tenth Circuit applied a very different test. The court ignored the requirement that marketwide anticompetitive effects be shown before proof of market power can be excused. Instead, the court concluded that proof of *some* dislocation to *some* market participants sufficed to declare the restraint unlawful, without any attempt to gauge the impact on the whole market, or even to define the market. That analysis confuses harm to some market participants with harm to competition. The two are not the same. See, *e.g.*, *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 115-117 (1987).

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[7] This deficiency is not overcome — but rather is greatly augmented — by the later damages award, which rested on the district court's ruling that *no* individual plaintiff needed to prove actual damages. The jury was allowed simply to assume that each restricted earnings coach would have earned 83.7% of the salary of the second full-time assistant at each school. See *Law* v. *NCAA*, No. 94-2053, Tr. 1742-1744 (D. Kan. 1998).

[8] Respondents incorrectly contend (Br. in Opp. 13-14) that the courts in *California Dental* and *Detroit Auto Dealers* did not require proof of market power. Leading commentators recognize that the Ninth Circuit in *California Dental* "concluded that application of the 'quick look' required at least a minimal showing of market power." P. AREEDA & H. HOVENKAMP, ANTITRUST LAW ¶ 1505, at 406 (1998 Supp.). Likewise, the administrative record in *Detroit Auto Dealers* made clear that more than 95% of Detroit dealerships participated in the challenged restraint. See *In re Detroit Auto Dealers Ass'n*, 111 F.T.C. 418, 479 (1989), aff'd, 955 F.2d 457 (6th Cir. 1992).

Board of Regents provides no fig leaf for the Tenth Circuit's remarkable failure to examine anything beyond asserted harm to some plaintiffs. This Court did not *presume* that the price and output restrictions in *Board of Regents* caused anticompetitive effects. Rather, that conclusion rested on factual findings, after a trial, that the relevant market consisted of television broadcasts of college football games, and that the broadcast limitations reduced the number of broadcasts and increased the price paid for that limited output. 468 U.S. at 111-113, 119-120. Moreover, the Court expressly held that the NCAA had "evident * * * market power." *Id.* at 111.

By contrast, the Tenth Circuit substituted circular reasoning for market analysis. In doing so, the decision below conflicts with decisions of this Court and other courts of appeals.

5. Respondents also claim that the Tenth Circuit's summary rejection of procompetitive justifications as not both absolutely necessary and optimally effective is "identical" (Br. in Opp. 15) to the standards applied by other courts of appeals. The conflicting decisions of those courts show otherwise.

As we explained (Pet. 23-24), the Third and Seventh Circuits have required the defendant in a "quick look" rule-of-reason case merely to articulate a plausible efficiency justification for the restraint in order to put plaintiffs to their proof of market power or actual anticompetitive effects. See Chang, Evans & Schmalensee, *Some Economic Principles For Guiding Antitrust Policy Towards Joint Ventures*, 1998 COLUM. BUS. L. REV. 223, 280 & n.116 (comparing "quick look" inquiry to burden-shifting in employment discrimination cases). The Tenth Circuit reads the rule of reason out of "quick look" analysis by imposing an impossible burden on defendants. Compare *id.* at 268 (warning against "easy" speculations "about alternative, less anticompetitive means").[9]

Respondents suggest (Br. in Opp. 16) that this Court in *Board of Regents* applied the same standard that the Tenth Circuit used below. This Court held, however, that the NCAA needed only to provide "some competitive justification" for a challenged restraint, 468 U.S. at 110, and stopped short of full rule-of-reason analysis only because the output limitation at issue in *Board of Regents* was

[9] The Solicitor General in *Board of Regents* likewise warned against judicial "second-guess[ing]" and too-easy resort to claims of less restrictive alternatives as a reason to disregard procompetitive justifications. Br. for the United States as Amicus Curiae at 12, 28-29, *Board of Regents*.

"not even arguably tailored" to the asserted procompetitive interests. *Id.* at 119. Unlike that output restraint, however, the REC Rule *did* "regulate * * * the way in which the colleges may use the revenues that are generated by their [basketball] programs." *Ibid.* That, this Court indicated, *would* serve a procompetitive "interest in maintaining a competitive balance" among schools. *Id.* at 118.[10]

6. Respondents now tell this Court that this case has limited significance and "does not threaten legitimate NCAA regulation of intercollegiate athletics." Br. in Opp. 17. Respondents' trial counsel whistled a different tune after the district court decision; then, this was "the most important legal case in the history of intercollegiate athletics." See Pet. 8. Neutral observers share respondents' unguarded view, not their revised one. See, *e.g.*, *$67 Million Hit Spurs Talk of Breaking Up NCAA*, CHI. TRIB., Aug. 11, 1998, § 4, at 1; see also Pet. 27-29. If the NCAA's carefully tailored response to a problem — in particular, its effort to *retain* one more coaching position — can be summarily condemned under the antitrust laws, it is difficult to see how the NCAA can avoid antitrust challenges to a host of other input restrictions. Indeed, as the American Council on Education explains (Amicus Br. 5), the strictures of the Tenth Circuit's decision would impede broader collective undertakings of the nation's colleges and universities.

NCAA v. *Board of Regents* is rightly regarded as one of this Court's most important antitrust decisions — not just because of its impact on sports, but because of its approach to the rule of reason, which guides most antitrust analysis. See, *e.g.*, M. HANDLER, R. PITOFSKY, H. GOLDSCHMID & D. WOOD, CASES AND MATERIALS: TRADE REGULATION 300-319 (4th ed. 1997); 7 P. AREEDA, ANTITRUST LAW ¶ 1511 (1986). This case is no less important. Wildly contrasting approaches — like those of the *Smith*, *Hennessey*, and *Oklahoma Regents* courts on the one hand, and the court below on the other — will proliferate if this Court does not act now to clarify its 14-year-old *Board of Regents* decision.

For the foregoing reasons and those given in the petition, the petition for a writ of certiorari should be granted.

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[10] "[T]he NCAA has a number of rules that seek directly to promote competitive parity in college football. These rules limit * * * the sizes of coaching staffs * * * — all without direct restrictions on output." Br. for the United States as Amicus Curiae at 21, *Board of Regents*.

Respectfully submitted.

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